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In the Supreme Court of the United States

OCTOBER TERM, 1973

NO.

UNITED STATES OF AMERICA, PETITIONER

v.

LUIS ANTONIO ORTIZ

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the United States of America, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINION BELOW

The opinion of the court of appeals (App. A, *infra,* p. 1A) is not yet reported. The opinion of the district court (App. C, *infra,* pp. 5A–41A) is reported at 368 F. Supp. 398.

JURISDICTION

The judgment of the court of appeals (App. B, *infra,* p. 3A) was entered on June 19, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether this Court's decision in *Almeida-Sanchez* v. *United States*, 413 U.S. 266—which held that a warrantless "roving patrol" search of an automobile for concealed aliens, conducted by Border Patrol officers acting without probable cause to believe that the vehicle contained any aliens, violated the Fourth Amendment's proscription against unreasonable searches and seizures—should be extended to invalidate a similar search for aliens at a fixed Border Patrol checkpoint.

2. Whether, if *Almeida-Sanchez* should be so extended, the extension should apply to checkpoint searches conducted prior to the date of the Ninth Circuit's decision in *United States* v. *Bowen*, in which that court, relying upon its interpretation of *Almeida-Sanchez* and overruling a long line of its prior decisions, held for the first time that warrantless checkpoint searches not based upon probable cause are unlawful.

STATUTE AND REGULATION INVOLVED

1. Section 287(a) of the Immigration and Nationality Act, as amended, 8 U.S.C. 1357(a), provides in pertinent part:

> Any officer or employee of the [Immigration and Naturalization] Service authorized under regulations prescribed by the Attorney General shall have power without warrant—
>
> (1) to interrogate any alien or person believed to be an alien as to his right to be or to remain in the United States;
>
> * * * * *

(3) within a reasonable distance from any external boundary of the United States, to board and search for aliens any vessel within the territorial waters of the United States and any railway car, aircraft, conveyance, or vehicle, and within a distance of twenty-five miles from any such external boundary to have access to private lands, but not dwellings, for the purpose of patrolling the border to prevent the illegal entry of aliens into the United States; * * *.

2. 8 C.F.R. 287.1 provides in pertinent part:

(a)(2) *Reasonable distance.* The term "reasonable distance," as used in section 287(a)(3) of the Act, means within 100 air miles from any external boundary of the United States or any shorter distance which may be fixed by the district director, or, so far as the power to board and search aircraft is concerned, any distance fixed pursuant to paragraph (b) of this section.

(b) *Reasonable distance; fixing by district directors.* In fixing distances not exceeding 100 air miles pursuant to paragraph (a) of this section, district directors shall take into consideration topography, confluence of arteries of transportation leading from external boundaries, density of population, possible inconvenience to the traveling public, types of conveyances used, and reliable information as to movements of persons effecting illegal entry into the United States: *Provided,* That whenever in the opinion of a district director a distance in his district of

more than 100 air miles from any external boundary of the United States would because of unusual circumstances be reasonable, such district director shall forward a complete report with respect to the matter to the Commissioner, who may, if he determines that such action is justified, declare such distance to be reasonable.

* * * * *

STATEMENT

After a non-jury trial in the United States District Court for the Southern District of California, respondent was convicted on three counts of transporting aliens who were present in this country illegally, in violation of 8 U.S.C. 1324(a)(2). He was sentenced to concurrent terms of imprisonment for three years. Execution of all but six months of the sentence was suspended, however, and respondent was placed on probation for three years.

1. The facts are contained in a stipulation (App. D, *infra,* pp. 43A–45A) and in the district court's findings based upon that stipulation (App. E, *infra,* pp. 47A–48A). On November 12 ,1973, near Oceanside, California, respondent placed three Mexican aliens in the trunk of his automobile and drove them north along Interstate Route 5. Respondent knew that each of the three aliens was present in this country illegally and that each had entered within the prior three years. When the vehicle reached the permanent Border Patrol immigration checkpoint near San Clemente, California, respondent was referred to the secondary

area for an inspection of his automobile. Border Patrol officers opened the trunk of the car and found the three aliens concealed inside the trunk.

2. Respondent moved prior to trial for suppression of the evidence resulting from the search of his automobile as the product of an unreasonable search and seizure. The district judge ordered the case consolidated with several other pending cases for an evidentiary hearing before another judge on the status of the various Border Patrol checkpoints located in the Southern District of California. This hearing was being conducted as an outgrowth of this Court's decision in *Almeida-Sanchez* v. *United States,* 413 U.S. 266.[1]

After several days of hearing, the district court issued a comprehensive opinion in the consolidated cases (App. C, *infra,* pp. 5A–41A). The court made detailed findings on the causes and consequences of the widespread illegal entry of immigrants from Mexico, the difficult law enforcement problems confronting the Border Patrol in its efforts to maintain an effective deterrent and to apprehend illegal entrants, the role of the Border Patrol's fixed immigration checkpoints in the overall law enforcement pro-

[1] In its General Order No. 176 (issued October 24, 1973), the district court had provided for the consolidation of the "large number of criminal cases now pending before this court" involving "searches conducted at checkpoints operated by the U.S. Border Patrol * * *." The court's intention was to "facilitate the presentation, by all interested parties, of any pertinent information which might aid the court in its eventual determination."

gram, and the placement and operating characteristics of each of the checkpoints in the Southern District of California.

The court found that the San Clemente checkpoint "is the primary, or cornerstone, checkpoint maintained by the Border Patrol in this District" (*id.* at 25A), that "[o]ver 12,000 deportable aliens were apprehended there alone in fiscal year 1973" (*ibid.*), and that the checkpoint is located at "the point least burdensome to traffic" on Interstate Route 5 between San Diego and Los Angeles (*id.* at 26A).

The court considered it necessary, under the majority's opinion in *Almeida-Sanchez,* to determine with respect to each of the Border Patrol checkpoints in the district whether a warrantless vehicle search for aliens without probable cause could be justified as the "functional equivalent" of a border search. That determination, the court reasoned, rests on whether the search occurs at "the first effective point of entry" (*id.* at 34A), taking into account the intrusiveness of the search, its relationship to legitimate Border Patrol objectives, the geographic characteristics of the checkpoint, and the available manpower resources of the Border Patrol. The court held on the basis of these criteria that searches of vehicles for aliens at the San Clemente checkpoint are constitutionally permissible as the functional equivalent of border searches (*id.* at 35A).[2]

[2] The court did not, however, specifically rule on the individual validity of any of the searches that had occurred in the 16 cases that were consolidated for the evidentiary hearing. That determination was left to the judge principally assigned to each case.

At the trial in the present case, held before the original judge on the same day that the opinion in the consolidated cases was issued, the district court denied respondent's motion to suppress, ruling that "the stopping of the vehicle and the search by the Border Patrol was a valid, legal search" (App. E, *infra*, pp. 47A–48A).

3. The court of appeals reversed on the authority of its *en banc* decision in *United States* v. *Bowen* (No. 72–1012, decided May 9, 1974, pending on petition for a writ of certiorari, No. 73–6848), in which it had held by a 7–6 vote (1) that evidence seized in a warrantless, non-probable-cause, checkpoint search of an automobile for aliens—if conducted after June 21, 1973, the date of this Court's decision in *Almeida-Sanchez*—must be suppressed under the principles of that case unless the search can be said to be the "functional equivalent" of a border search, and (2) that "the search is a functional equivalent of a border search" only if it "takes place at a location where virtually everyone searched has just come from the other side of the border" or if it can be said with "reasonable certainty that the vehicle searched contained either goods which have just been smuggled or a person who had just crossed the border illegally" (*Bowen, supra*, slip op. at 7–9).[3]

Since the search in the present case occurred on November 12, 1973, the panel held that the search was

[3] The court of appeals subsequently held that routine searches at the San Clemente checkpoint do not satisfy these standards and are not the functional equivalent of border searches. *United States* v. *Morgan* (No. 73–1669, decided June 14, 1974).

unlawful under *Bowen* and that "[t]he evidence (illegal aliens) discovered during the search should have been suppressed" (App. A, *infra*, p. 1A). The court therefore reversed the judgment of conviction and, since the government would have "no case" without the aliens, directed that the indictment be dismissed.

REASONS FOR GRANTING THE WRIT

1. This case presents an important issue left undecided in *Almeida-Sanchez*. The Court held in that case that "roving patrol" searches of automobiles for aliens, without probable cause or reasonable suspicion, are unlawful in the absence of a warrant. The Court did not determine "the constitutional propriety of searches at permanent or temporary checkpoints removed from the border or its functional equivalent" (413 U.S. at 276, Mr. Justice Powell concurring).[4]

a. The Border Patrol operates 17 "permanent" and 30 "temporary" immigration checkpoints[5] in the southwestern region of the United States. Operations at each may be affected by the resolution of the issue whether warrants are required for checkpoint searches. Moreover, the outcome of a substantial number of pending prosecutions for violations of the immigration laws and for other offenses, in which essential evidence was procured by warrantless, non-probable-

[4] Mr. Justice White's dissenting opinion stated that "apparently" it is not "disputed that warrantless searches for aliens without probable cause *may* be made at fixed checkpoints away from the border" (413 U.S. at 288, emphasis added).

[5] The differences between permanent and temporary checkpoints are explained in the district court's opinion (App. C, *infra*, pp. 15A-16A).

cause, checkpoint searches, will turn on the answer to the questions presented in this petition.

There is considerable confusion in the lower federal courts over the validity of warrantless checkpoint searches and the propriety under the Fourth Amendment of issuing warrants to conduct such searches.[6] In the *en banc* decision of this issue in *United States* v. *Bowen, supra,* both the majority and the dissenting opinions focused primarily on the interpretation of *Almeida-Sanchez* and its application to checkpoints, each contending with equal vigor that this Court had resolved the issue (or suggested a resolution of the issue) in a manner consistent with the conclusion of that opinion. The vote on the question was 7–6, which we believe strongly evidences the fact that this important issue has not yet been definitively resolved by this Court and should be so resolved to eliminate the confusion that currently prevails.[7]

---

[6] The government has applied for but has been refused warrants permitting the Border Patrol to search vehicles for aliens at checkpoints in the Southern District of California. The magistrates have been willing to issue warrants permitting only stops of vehicles for interrogation, apparently because of their view that the Fourth Amendment does not permit the issuance of general search warrants on a checkpoint basis.

[7] In the Court of Appeals for the Fifth Circuit, for example, one panel has held that a warrantless vehicular search in the absence of probable cause at a temporary checkpoint is unlawful under *Almeida-Sanchez* unless it is the functional equivalent of a border search (*United States* v. *Speed*, 489 F. 2d 478, pending on petition for rehearing). In another case, originally decided prior to this Court's decision in *Almeida-Sanchez*, a different panel denied a renewed petition for rehearing on the ground that *Almeida-Sanchez* did not apply because the defendant "was

(Continued)

The uncertainty concerning the proper application of this Court's decision in *Almeida-Sanchez* and the propriety of checkpoint warrants threatens severely to hamper effective law enforcement efforts on the part of the Border Patrol.

b. We contend that the decision in this case and the decision in *Bowen* (on which the present decision rests) represent an unwarranted extension of *Almeida-Sanchez*.[8] We ground our contention principally upon the reasoning of Mr. Justice Powell's concurring opinion in *Almeida-Sanchez*. As that opinion recognizes, the reasonableness of a search of an automobile for aliens does not necessarily depend upon the existence of probable cause to believe that a concealed alien will be found in that automobile. Rather, as in *Camara* v. *Municipal Court*, 387 U.S. 523, a particular search may be reasonable if conducted as part of an area-wide program of searches that is itself reasonable, measured by the existence of a legitimate law enforcement need, balanced against the extent of the official intrusion. As Mr. Justice Powell stated (413 U.S. at 279):

> The conjunction of these factors—consistent judicial approval, absence of a reasonable alter-

(Continued)
stopped, not by a roving border patrol, but at an established checkpoint ten miles north of the border" (*United States* v. *DeLeon*, No. S72-1052, decided November 1, 1973).

The Court of Appeals for the Tenth Circuit has held that the principles of *Almeida-Sanchez* apply to checkpoint searches. *United States* v. *King*, 485 F. 2d 353; *United States* v. *Maddox*, 485 F. 2d 361.

[8] We do not contend that the San Clemente checkpoint is the functional equivalent of the border. In our view, the court of appeals' definition of that phrase in *Bowen* (*supra*, p. 7) is substantially correct.

> native for the solution of a serious problem, and only a modest intrusion on those whose automobiles are searched—persuades me that under appropriate limiting circumstances there may exist a constitutionally adequate equivalent of probable cause to conduct roving vehicular searches in border areas.

The existence of a "constitutionally adequate equivalent of probable cause" does not end the inquiry, however, because "both the concept of probable cause *and* the requirement of a warrant bear on the reasonableness of a search" (*id.* at 277, emphasis added). The further question in *Almeida-Sanchez,* then, was whether a requirement for "a prior judicial determination" of the reasonableness of the Border Patrol's plan for a particular roving patrol operation would be an effective and feasible means of assuring that the plan represents a reasonable "balanc[e] of the legitimate interests of law enforcement with protected Fourth Amendment rights" (*id.* at 284). Mr. Justice Powell concluded, despite our argument to the contrary, that such a prior judicial determination would substantially enhance the reasonableness of a roving patrol operation and should be required.

We submit that prior judicial approval of a fixed checkpoint operation, in contrast to approval of a roving patrol or "area search" operation (*ibid.*), would add little to the reasonableness of checkpoint operations and that a subsequent judicial determination on a motion to suppress adequately protects Fourth Amendment values.

On a roving patrol operation, officers cruise in a patrol car in order to observe traffic in a prescribed

area. When they see a vehicle that arouses their subjective suspicion, they pursue and stop it and usually subject it to a search for concealed aliens. Roving patrols are usually conducted at night on infrequently traveled roads. The areas of operation may vary from season to season and even from night to night. By the nature of the operation, one roving patrol may be quite unlike another, even in the same area.

Checkpoint operations, by contrast, are conducted at stationary locations where officers ordinarily inspect only those vehicles that approach the checkpoint. Checkpoints are located on major thoroughfares and are highly visible. They are operated in daylight or at night under floodlights, in some cases on a 24-hour basis. The vehicle inspection procedure is regularized, and one day's operation is essentially the same as any other's (see App. C, *infra,* pp. 16A–17A).

These differences between roving patrol and fixed checkpoint operations are significant for several reasons. First, because a checkpoint is stationary and its routine operation is consistent from day to day and even from year to year, there is little need for periodic *ex parte* judicial approval in *advance* of its operation during a particular week or month. The reasonableness of the checkpoint's operation can effectively be adjudicated for the first time in an adversary criminal proceeding, and, once the court has determined that the operation of a particular checkpoint is reasonable, that reasonableness would not be substantially enhanced by repeated approvals in advance of subsequent periods of operation.

That is not to say that an aggrieved person may not allege and prove in a particular factual setting that the stop and search of his automobile was unlawful or that the checkpoint's operation is unreasonable. But we do say the Fourth Amendment values at stake are adequately protected when those claims are adjudicated *after* a checkpoint search has been conducted and in the context of an adversary proceeding on specific facts.

By contrast, prior judicial approval of a roving patrol operation, based upon considerations such as those stated in Mr. Justice Powell's concurring opinion (413 U.S. at 283–284), may be viewed as a meaningful enhancement of the operation's reasonableness. Since the circumstances of any particular operation are likely to be unique, prior approval of past operations is not necessarily an accurate measure of the reasonableness of the present one. Whereas the "basic decision" (*id.* at 283) to operate a roving patrol in a particular area is made repeatedly, each time on the basis of varying factors, the basic decision to operate a checkpoint at a particular location is made only once, and the pertinent factors remain relatively unchanged in the absence of significant new highway construction.

Finally, since there is significantly less flexibility in the operation of a fixed checkpoint than in the operation of a roving patrol, there is correspondingly less need for judicial supervision of the manner and scope of the operation. The procedures at a fixed checkpoint present less danger that Border Patrol officers will

abuse what the majority in *Almeida-Sanchez* called their "unfettered discretion" (*id.* at 270).

2. If the Court concludes, contrary to our submission, that checkpoint searches without probable cause are reasonable only if conducted pursuant to a warrant, it does not follow that the evidence in this case should have been suppressed. It is our contention that, if *Almeida-Sanchez* is to be thus extended, the extension should not apply to the present case because the search here was conducted prior to May 9, 1974, the date of the court of appeals' decision in *United States* v. *Bowen* (C.A. 9, No. 72–1012, pending on petition for a writ of certiorari, No. 73–6848).

Bowen is the case in which the Ninth Circuit, sitting *en banc*, held that warrantless checkpoint searches in the absence of probable cause are unlawful. In *Bowen,* however, the court of appeals, while holding that its application of *Almeida-Sanchez* to checkpoint searches should not be given retroactive effect, held that the cutoff date for retroactivity purposes should be the date of the decision in *Almeida-Sanchez,* which was June 21, 1973.[9] Accordingly, since the search in the instant case took place on November 12, 1973 (App. D, *infra,* p. 44A), the court of appeals ap-

[9] In *United States* v. *Peltier* (No. 73–2509, decided May 9, 1974, petition for writ of certiorari pending, No. 73–2000), the Ninth Circuit held that the *Almeida-Sanchez* decision itself should be fully retroactive (at least with respect to roving patrol cases in which a judgment of conviction had not become final by the time of the *Peltier* decision). It is our view, as reflected in our petition in *Peltier* and in the decision in *United*

plied its decision in *Bowen* and ordered suppression of the evidence. We submit that it erred in so doing, and that suppression should be ordered only with respect to warrantless, non-probable-cause, checkpoint searches occurring subsequent to the decision in *Bowen*.

Prior to that decision, such searches had consistently and repeatedly been upheld by the Ninth Circuit (see *Bowen*, slip op. at 26–28 and n. 2), and the issue had been specifically left open by this Court in *Almeida-Sanchez* (see p. 8 and n. 4, *supra*). In these circumstances, the Border Patrol justifiably relied upon existing law in the Ninth Circuit in continuing to conduct checkpoint searches after the decision in *Almeida-Sanchez*.

Bowen thus represents "a clear break with the past" (*Desist* v. *United States*, 394 U.S. 244, 248) in the Ninth Circuit. Since the "prime purpose" of the exclusionary rule "is to deter *future* unlawful police conduct" (*United States* v. *Calandra*, 414 U.S. 338, 347, emphasis added), the new rule announced in *Bowen* should be applied only to checkpoint searches occurring after the date of the decision in that case.

We submit that this position is correct not only as a matter of retroactivity doctrine (the court of appeals divided 7–6 in *Bowen* on the issue of whether

States v. *Miller*, 492 F.2d 37 (C.A. 5), that the principle announced in *Almeida-Sanchez* with respect to roving patrol searches should govern the admissibility of evidence only with respect to searches conducted after June 21, 1973.

Almeida-Sanchez could properly be limited to prospective application in the case of checkpoint searches), but also from a consideration of the appropriate scope of and limitations on the exclusionary rule. Whether or not *Almeida-Sanchez* can properly be viewed as a "change" in the law, since it did not entail the overruling of any prior decision of this Court, it is manifest that the deterrent purposes of the exclusionary rule are in no way advanced by imposing the sanction against official investigative activities undertaken in complete good faith and in reasonable reliance upon apparent statutory authorization and judicial approval of such activities by the courts of appeals. As this Court observed in *Michigan* v. *Tucker,* No. 73–482, decided June 10, 1974, slip op. 13:

> The deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in willful, or at the very least, negligent conduct which has deprived the defendant of some right. By refusing to admit evidence gained as a result of such conduct, the courts hope to instil in those particular investigating officers, or in their future counterparts, a greater degree of care towards the right of an accused. Where the official action was pursued in complete good faith, however, the deterrence rationale loses much of its force.

These observations apply with full force to the actions of the Border Patrol in conducting both checkpoint and roving patrol (see *United States* v. *Peltier,* pending on petition for a writ of certiorari, No. 73–2000)

searches prior to the decision of this Court in *Almeida-Sanchez* and to the conduct of checkpoint searches prior to the decision in *Bowen*.

Thus, as a matter either of retroactivity doctrine or of exclusionary rule policy—both of which are matters governed by substantially similar considerations—evidence procured in checkpoint searches, even if the searches are held to have been illegal, should not be suppressed with respect to any particular search conducted prior to the date of the first controlling judicial determination of illegality of such types of searches.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be granted.

ROBERT H. BORK,
Solicitor General.
HENRY E. PETERSEN,
Assistant Attorney General.
MARK L. EVANS,
Assistant to the Solicitor General.

JULY 1974.

APPENDIX A

United States Court of Appeals for the Ninth Circuit

(No. 74–1249)

(Memorandum)

UNITED STATES OF AMERICA, APPELLEE

v.

LUIS ANTONIO ORTIZ, APPELLANT

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA

(Filed June 19 1974)

Before ELY and HUFSTEDLER, *Circuit Judges,* and WILLIAMS,* *District Judge*

This fixed checkpoint stop and search, occurring after the decision of *Almeida-Sanchez* v. *United States* (1973) 413 U.S. 266, was illegal. (*United States* v. *Bowen* (9th Cir. en banc 1974) —— F. 2d ——.) The evidence (illegal aliens) discovered during the search should have been suppressed. Without the aliens, the Government has no case. The judgment is reversed with directions to dismiss the indictment.

*Hon. David W. Williams, Central District, California, sitting by assignment.

APPENDIX B

United States Court of Appeals for the Ninth Circuit

(Judgment)

(No. 74–1249—DC #16360)

UNITED STATES OF AMERICA, APPELLEE

v.

LUIS ANTONIO ORTIZ, APPELLANT

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA

This Cause came on to be heard on the Transcript of the Record from the United States District Court for the Southern District of California and was duly submitted.

On Consideration Whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is *Reversed With Directions To Dismiss the Indictment.*

A True Copy:

Attest: June 26, 1974.

EMIL E. MELFI, Jr.,
Chief Deputy and Acting Clerk
(by Ray Hewitt, Senior Deputy).

Filed and entered June 19, 1974.

APPENDIX C

United States District Court for the
Southern District of California

UNITED STATES OF AMERICA, PLAINTIFF

v.

BERNARDO CUELLAR BACA, 15656; CHARLES EARL BENSON, CHALMER LYNN CARTER, 14964; PETER FREDERICK SACKRIDER, 15803; LAURA ELENA ESQUER-RIVERA, ANACLETO NAVABIBAYOFF, 15850; MICHAEL-ALFRED RAY, 15813; CAMILO JUAREZ-RODRIGUEZ, ADELA SOLORIO JUAREZ, 15991; NORMAN RICHARD LINDSAY, 14344; GLORIA MAY GILMORE, 15410; JAMES R. THOMPSON, 16245; DONALD JAMES PENNINGTON, PHILIP LUTHER OMDAHL, 15666; LUCERO ALBERTO ESCALANTE, 15463; JOE VALDIVEZ LUNA, 15847; DENNIS JAMES RICH, 15046; PETER MICHAEL RANDRUP, 15650; LUIS ANTONIO ORTIZ, 16360; SCOTT EUGENE ATKINSON, 15606; DEFENDANTS

(Filed December 5, 1973)

OPINION

On June 21, 1973, the United States Supreme Court ruled in *Almeida-Sanchez v. United States,* —— U.S. ——, 41 U.S.L.W. 4970 (1973) that a "roving search" of an automobile, without a warrant and without probable cause, when not a border search, or the functional equivalent thereof, violated the Fourth Amendment to the United States Constitution. There-

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after, the Ninth Circuit remanded cases to this and other districts for "consideration of the impact of *Almeida-Sanchez. . . .*" E.g. *U.S. v. Cuellar Baca,* Slip No. 73–2048 (Sept. 10, 1973). Presently there are well in excess of 20 cases pending in this District either on remand from the Circuit or upon original hearing raising constitutional questions left open by *Almeida-Sanchez.*

On October 21, 1973, the judges of the United States Federal District Court for the Southern District of California in General Order 176 ordered that a comprehensive factual hearing be held to evaluate the consequences, if any, of *Almeida-Sanchez* on the checkpoints operated by the Border Patrol within this District. All cases in this District raising this issue were consolidated on a voluntary basis.

Subsequently, on November 19, 20 and 21, this Court held hearings wherein the interested parties presented evidence on this question. This Court, it should be noted, did not include in its deliberations the issue of *Almeida-Sanchez'* retroactivity.

Based upon that hearing and the extensive evidence submitted, the Court files the following opinion.

THE ILLEGAL ALIEN PROBLEM

The United States through legislative action has determined that it is in the best interests of the nation to limit the number of persons who can legally immigrate into the country in any given year. These controls reflect in part a Congressional intent to protect the American labor market from an influx of foreign labor. *Karnuth v. United States,* 279 U.S. 231 (1929); § 201(b) of the *Immigration and Nationality Act of 1952,* 66 Stat. 163, as amended by the Act of October 3, 1965, 79 Stat. 911, 8 U.S.C. § 1151(a).

Under this policy of limited admission, 385,685 new immigrants entered the United States legally during fiscal year 1972. Since July 1, 1968, the law has established an annual quota of 120,000 persons for the independent countries of the Western Hemisphere. Included within this quota are immigrants from the Republic of Mexico who in fiscal year 1972 totalled 64,040. 1972 Annual Report, *Immigration and Naturalization Service,* p. 2.

Currently illegal aliens are in residence within the United States in numbers which, while not susceptible of exact measurement, are estimated to be in the vicinity of 800,000 to over one million. Department of Justice, Special Study Group on Illegal Immigrants from Mexico, *A Program for Effective And Humane Action on Illegal Mexican Immigrants,* 6 (1973), [hereinafter cited as *Cramton Rpt.*].

Of these illegal aliens, approximately 85 percent are citizens of Mexico. *Cramton Rpt.* at 6. They are industrious, proud and hard-working people who enter this country for the purpose of earning wages, accumulating savings, and returning or sending their savings home to Mexico.

Since 1970, the number of illegal Mexican aliens in the United States who have been apprehended has been growing at a rate in excess of 20 percent per year. *Cramton Rpt.* at 6.

The increasingly large numbers of Mexican nationals seeking to illegally enter this country reflects the substantial unemployment and underemployment in Mexico—fueled by one of the highest birth rates in the world. Moreover, Mexican employment statistics are not likely to improve dramatically since fully 45 percent of Mexico's population is under 15 years of age and, therefore, will soon be attempting to enter the labor market.

Further prompting Mexican nationals to seek employment in the United States is the fact that there is a significant disparity in wage rates between this country and Mexico. In Mexicali and Tijuana, both Mexican cities bordering the Southern District and each with a population in excess of 400,000, the average daily wage is about $3.40 per day. The minimum wage is even lower for workers in the interior of Mexico. The average worker in Mexico, assuming he can find work, earns in a day as much as he can make in only a few hours in the United States.

In addition, it is estimated that the per capita income of the poorest 40 percent of the Mexican population, the strata most likely to leave their homeland in search of a better life in the United States, is less than $150 per year.

The manpower needs of the United States generated by World War II resulted in many Mexicans being imported into this country and becoming familiar with employment opportunities and practices in the United States. See *Diaz* v. *Kay-Dix Ranch,* 9 Cal. App. 3d 595 (1970).

The opportunities available to Mexican aliens have traditionally been in agriculture. While still true in many parts of the United States Southwest, in recent years the pattern has changed and more and more illegal aliens are obtaining employment in service and manufacturing sectors of our economy. These aliens are increasingly found in virtually all regions of the country and in all segments of the economy. State Social Welfare Board, *Issue: Aliens in California,* 12 (1973) [Hereinafter cited as *Aliens in California*].

The nature of the change in employment opportunities available is demonstrated by one estimate that 250,000 illegal aliens are employed in Los Angeles County where agricultural opportunities are known

to be limited. *Hearings on Illegal Aliens Before Subcomm. 1 of the House Comm. on the Judiciary,* 92d Cong., 1st Sess., pt. 1, at 208 (1971) [Hereinafter cited as *Hearings on Illegal Aliens*].

Other estimates of the impact of illegal aliens in California suggest that in 1971, when 595,000 Californians were unemployed (7.4 percent of the State's labor force), there were between 200,000 and 300,000 illegal aliens employed in California earning approximately $100 million in wages. *Hearings on Illegal Aliens* at 150.

Since the majority of Mexicans are unskilled or low skilled workers they tend to compete with Mexican-Americans, blacks, Indians, and other minority groups who, due to the declining percentage of jobs requiring low or no skills, are finding it increasingly difficult to obtain gainful employment. *Cramton Rpt.* at 12.

Illegal aliens compete for jobs with persons legally residing in the United States who are unskilled and uneducated and who form that very group which our society is trying to provide with a fair share of America's prosperity.

In addition, illegal aliens tend to perpetuate poor economic conditions by frustrating unionization, especially in such occupations as farm work.

Illegal aliens pose a potential health hazard to the community since many seek work as nursemaids, food handlers, cooks, housekeepers, waiters, dishwashers, and grocery workers. Immigration and medical officials in Los Angeles, for example, have discovered that the illegal alien population in Los Angeles' barrio is infected with a high incidence of typhoid, dysentery, tuberculosis, tapeworms, venereal disease and hepatitis. *L.A. Times,* Sept. 16, 1973, pt. II, at 1.

In some states illegal aliens abuse public assistance programs. In some instances entire families who en-

tered the country illegally have been admitted to the welfare rolls. *Aliens in California* at 35, 43.

Another aspect of the problem created by illegal aliens is that employed aliens tend to send a substantial portion of their earnings to relatives or friends in Mexico. This outflow of United States dollars exacerbates our balance of payments problem to the extent of $1 billion a year. *Hearings on Illegal Aliens,* pt. 3 at 683.

The net effect of this silent invasion of illegal aliens from Mexico is suffering by the aliens who are frequently victims of extortion, violence and sharp practices, displacement of American citizens and legally residing aliens from the labor market, and irritation between two neighboring countries.

THE LAW ENFORCEMENT PROBLEM

Given that illegal aliens are a significant problem in American life, especially for those minority groups who are described as economically deprived, and that Congress has decreed that all but a relatively few aliens are to be permanently excluded, then we must analyze what law enforcement problems exist. In this regard, the following findings of fact are made:

The illegal alien problem is one found primarily in the Southwestern Region of the United States.

This problem along the Mexican-American border has existed for some time with the original responsibility for securing the integrity of the border being assigned to the U.S. Army, along with the Departments of Treasury and Labor, who had about 20,000 men assigned to the border between Brownsville, Texas, and San Diego, California, in 1920. *National Geographic Magazine,* "Along Our Side of the Mexican Border" (July 1920).

Currently the burden of controlling the entry of aliens and stemming the flow of illegal aliens along the Mexican-American border is assigned to the INS.[1] This border extends for almost 2,000 miles from the Gulf of Mexico to the Pacific Coast.

Along this border there were over 152 million legal entries at authorized ports of entry during fiscal 1972, of which over 91 million were made by aliens, with over 39 million legal entries being made at the three ports of entry in Southern California (Calexico, San Ysidro and Tecate) of which over 24 million were made by aliens. Immigration and Naturalization Service, *1972 Annual Report*, 25.

Of these entries made by aliens, the large portion were made by visitors with official permission to enter the country who had been issued temporary "border passes" such as I–186 cards (issued to residents of Mexico), which authorize the holder to travel within an area no further than 25 miles from the border and for a period of time not to exceed 72 hours. See 8 C.F.R. § 212.6.

These temporary border passes (I–186) are issued to simplify procedures needed for entry, and the issuing process recognizes the inter-relationship of contiguous communities along both sides of the border. *Hearings on Illegal Aliens*, pt. 1, 192.

In fiscal 1973 approximately 208,000 I–186 cards were issued and it is estimated that over two million such cards are currently in circulation. *Hearings on Illegal Aliens*, pt. 1, 173.

Within the INS, the U.S. Border Patrol, which was first established in 1924, has the primary function of preventing the illegal entry of aliens and the

[1] The notation "INS" when used herein has reference to the Immigration and Naturalization Service.

apprehension of those who have entered illegally and those who smuggle these illegal entrants.

The Border Patrol has approximately 1,700 agents, who are well-trained law enforcement officers, and of these about 80 percent are assigned along our southern border with Mexico.

A "deportable alien" is a person who has been found to be deportable by an immigration judge, or who admits his deportability upon questioning by official agents.

The number of deportable aliens apprehended by the Border Patrol (which makes the great majority of apprehensions) nationally has grown from 38,861 during fiscal 1963 to 498,123 in fiscal 1973; of this number 128,889 were found by Border Patrol agents working in the Chula Vista sector which includes 70 miles of the border in San Diego County, and 23,125 were located by agents in the El Centro sector which includes the Imperial County of California and 75 miles of the Mexican-American border.

The Border Patrol agents have the power to apprehend illegal aliens since by regulation the Attorney General has designated Border Patrol agents to be immigration officers and authorized them to exercise powers and duties as such officers [8 C.F.R. § 103.1 (i)]; immigration officers have been given certain functions by statute § 101(a)(17) of the Immigration and Nationality Act of 1952, 66 Stat. 163; as amended by the Act of October 3, 1973, 79 Stat. 911, 8 U.S.C. § 1101(a)(17), which provides that an officer of the INS shall have the power, without a warrant, to stop and interrogate any alien or person believed to be an alien as to his right to remain or to be in the United States. See *Au Yi Lau* v. *I.N.S.*, 445 F. 2d 217 (D.C. Cir. 1971), *cert. denied*, 404 U.S. 864.

Sec. 287(a)(3) of the 1952 Immigration Act includes authority for an immigration officer within a

reasonable distance from the border of the United States to board and search any conveyance or vehicle; "reasonable distance" as used in that section of the Act means within 100 air miles from any external boundary of the United States, 8 C.F.R. § 287.1(b).

Immigration officers also are authorized to conduct inspection of aliens seeking admission or readmission to, or the privilege of passing through, the United States, and also are authorized and impowered to board and search any vehicle or like conveyance in which they believe aliens are being brought into the United States. Sec. 235(a) of the 1952 Immigration Act, 8 U.S.C. § 1525(a).

The deployment of Border Patrol agents along the border is intended to maximize the effectiveness of the limited number of personnel, with the first line of defense being called the "line watch." The line watch consists of agents being placed immediately upon the physical boundary where experience has shown that large numbers of illegal aliens can be detected attempting entry. A large number of agents so assigned are primarily concerned with responding to sensor alarms (electronic detection equipment) which are located at strategic positions. These agents also respond to citizen complaints concerning the suspected presence of deportable aliens.

In fiscal 1973, there were 175,511 deportable aliens apprehended throughout the nation by agents assigned to the line watch, with 69,147 being apprehended in the Chula Vista sector and 5,908 in the El Centro sector.

While the Border Patrol would like to apprehend all deportable aliens right on the border by agents on the line watch, inspections at regular points of entry are not infallible and illegal crossings at other than legal ports of entry are numerous and recurring with the maintenance of continuous patrol over these

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vast stretches of the border in Southern California being physically impossible, for the approximately 145 miles of boundary creates physical barriers to effective patrol and man-made devices such as fences and electronic devices are in large part ineffective.

Increased manpower on line watch would not make that activity appreciably more effective as was demonstrated in 1969 during "Operation Intercept" wherein many more agents were stationed immediately on the border, and yet, the number of illegal aliens apprehended by agents operating inland was not significantly different from like periods when such additional manpower was not located at the boundary.

Once the aliens negotiate their way through the port of entry or walk across the border at a place other than an official port of entry, they find transportation inland either in public conveyances, or private vehicles with increasing numbers being transported by professional smugglers. A few have been known to walk some distance inland and be apprehended after having walked as far north as Julian, California, which is over 60 miles from the border.

After crossing the line watch some illegal aliens seek employment in the Southern District, but the vast majority attempt to proceed to Los Angeles County and further northward.

Once the illegal alien gets settled in a big city far away from the border it becomes very difficult to apprehend him, and, therefore, the Border Patrol attempts to contain the illegal entrant within this district. *Aliens in California* at 7. With this objective in mind, they have (pursuant to their statutory authority discussed above) established, since at least 1927, strategically located traffic inspection facilities, commonly referred to as checkpoints, on highways and roads, for the purpose of questioning vehicle occupants believed to be aliens, as to their right to be, or

to remain, in the United States, and also to search such vehicles for aliens illegally therein. Immigration and Naturalization Service, *Border Patrol Handbook* 9–1 (1972) [hereinafter cited as *Handbook*].

The primary objective of the checkpoints is to intercept vehicles or conveyances transporting illegal aliens, or nonresident aliens admitted with temporary border passing cards (Form I–186), with particular attention being paid to vehicles operated by smugglers or transporters destined for the interior in violation of 8 U.S.C. § 1324.

The selection of the location of a checkpoint is determined by factors relevant to the interdiction or interception of deportable aliens who have succeeded in gaining entry in an unlawful manner or are proceeding beyond the immediate border area in violation of conditions of their admission as border crossers, 8 C.F.R. § 212.60. The primary factors in selecting a checkpoint site are:

1. A location on a highway just beyond the confluence of two or more roads from the border, in order to permit the checking of a large volume of traffic with a minimum number of officers. This also avoids the inconvenience of repeated checking of commuter or urban traffic which would occur if the sites were operated on the network of roads leading from and through the more populated areas near the border.

2. Terrain and topography that restrict passage of vehicles around the checkpoint, such as mountains, desert, and as in the case of the San Clemente checkpoint, the Camp Pendleton Marine Base.

3. Safety factors: an unobstructed view of oncoming traffic, to provide a safe distance for slowing and stopping; parking space off the highway; power source to illuminate control signs and inspection area, and bypass capability for vehicles *not* requiring examination.

4. Due to the travel restrictions of the Form I–186 nonresident border crosser to an area 25 miles from the border (unless issued additional documentation) the checkpoints, as a general rule, are located at a point beyond the 25 mile zone in order to control the unlawful movement into the interior of such visitors, *Handbook*.

Strategic sites that meet the foregoing enumerated criteria are selected for "permanent checkpoints." These are sites equipped to handle a large volume of traffic on what would be a 24-hour basis except in case of manpower shortage, poor weather, or where traffic becomes excessive causing a potential safety hazard. *Handbook* at 9–3.

Other traffic checkpoints, known as "temporary checkpoints" are maintained on roads where traffic is less frequent. The placement of these sites will be governed by the same safety factors as involved in permanent site placement and are usually located where the terrain allows an element of surprise. Operations at these temporary checkpoints are set up at irregular intervals and intermittently so as to confuse the potential violator. *Handbook* at 9–3.

When the checkpoints, whether permanent or temporary, are in operation, an officer standing at the "point" in full dress uniform on the highway will view the decelerating oncoming vehicles and their passengers, and will visually determine whether he has reason to believe the occupants of the vehicle are aliens (i.e., "breaks the pattern" of usual traffic). If so, the vehicle will be stopped (if the traffic at the checkpoint is heavy, as at the San Clemente checkpoint, the vehicle will be actually directed off the highway) for inquiries to be made by the agent. If the agent does not have reason to believe that the vehicle approaching the checkpoint is carrying aliens,

he may exchange salutations, or merely wave the vehicle through the checkpoint.

If, after questioning the occupants, the agent then believes that illegal aliens may be secreted in the vehicle (because of a break in the "pattern" indicating the possibility of smuggling) he will inspect the vehicle by giving a cursory visual inspection of those areas of the vehicle not visible from the outside (i.e. trunk, interior portion of camper, etc.).

At the point of location of the sites now in regular use few aliens have reached the locale on foot, with 99% having entered a vehicle of one type or another. Approximately 12% of all apprehensions of deportable aliens throughout the nation are made at checkpoints.

In the United States, during fiscal 1973, approximately 55,300 deportable aliens were apprehended by Border Patrol agents working traffic checking operations. In the Chula Vista sector the number for that period was 21,232, while in the El Centro sector the total was 3,825.[2] During fiscal 1973, a total of 4,975 of the above were visitors apprehended at the checkpoints and a majority of these were those who were in violation of the terms of temporary border passes (Form I–186).

The placement of the checkpoints and their operations are coordinated between the two sectors located in this district and with Border Patrol activities to the east in Arizona. In actual operation the checkpoints, be they "permanent" or "temporary," have the same basic accouterments. Typically, about one-half mile to one mile south of the checkpoint is the first notifica-

[2] Apparently apprehensions other than those actually made at the checkpoint are included in these figures, but they are a representation of the total activity at these checkpoints and the majority of apprehensions included therein are made at the checkpoints [R. T. 274, 396].

tion that the checkpoint is ahead. The notice is in the form of a black on yellow sign indicating "STOP AHEAD" which has floodlights for nighttime illumination, *Handbook* at 9–9. Next, about 200 yards from the checkpoint is another sign cautioning the traffic to slow down or to be careful; this sign usually has flashing yellow lights attached. For the fifty yards directly south of the checkpoint there are placed traffic cones evenly spaced along each side of the highway. The actual checkpoint has a sign indicating to the traffic to stop, with official Border Patrol vehicles parked on each side of the stop zone showing the official Border Patrol emblem and/or the designation U.S. OFFICERS. At this point the agents assigned at the "point," in their official uniform, conduct checking and inspection operations. Beyond the checkpoint is usually a sign indicating "THANK YOU."

While a large number of apprehensions are made at the checkpoints each year, as related above, the primary reason for their operation is that they effectively deter large numbers of aliens from illegally entering the country or violating the terms of any temporary crossing card they may have, because they form an effective obstacle and are located on all major routes north out of the border region.

The deterrence aspect of these traffic checkpoint operations is amply demonstrated by the fact that the illegal alien has to resort to the employment of professional smugglers to provide transportation around or through these checkpoints.

Some of these smuggling operations have developed into sophisticated and involved operations with the following general *modus operandi:*

1. Contact is made between the smuggler and the alien prior to the latter's leaving Mexico.

2. The aliens then make entry on foot, with possibly the aid of a "guide," or by use of temporary border passes. Then they enter vehicles approximately 2 or 20 miles in and after having passed through the Border Patrol's line watch activities.

3. To get through the traffic checkpoint they might use a "drop house," which acts as a staging area to keep the aliens awaiting inclement weather, or any event that might cause the checkpoint to close down temporarily. Or, they may use a "decoy" vehicle, which is a vehicle loaded with illegal aliens which it is anticipated will be stopped at the checkpoint and would therefore occupy the agents so that other vehicles could pass through without inspection. They even use "scout cars" to probe those roads where temporary checkpoints are maintained, so as to advise other vehicles whether it is safe to proceed.

4. The "load" vehicles themselves can be of any type of conveyance and the methods used to secret aliens inside them are varied and often show some originality. Unfortunately, sometimes these are very dangerous to the aliens themselves, for it has been reported that it is not at all unusual for an alien to die from asphyxiation while concealed in an automobile trunk or a tank car.

5. The cost of the transportation provided to the aliens is approximately $225 to $250 for each alien for the trip through the checkpoint on to the Los Angeles area. Since smuggling operations are almost exclusively "cash and carry" businesses and the average income among Mexican nationals who may wish to seek residence here illegally is quite small, then this cost tends to act as a very significant deterrent in and of itself. The checkpoints are the major reason for such a high price and if they were discontinued for any length of time it would be one more encouragement to illegal immigration.

The deterrent impact of these checkpoints has been noted on several occasions when they resumed operation unexpectedly and a great number of aliens were apprehended.

The evidence presented before this court clearly establishes that there is no reasonable or effective alternative methods of detection and apprehension available to the Border Patrol, in the absence of the checkpoints for even a geometric increase in its personnel or line watch would not leave any control over those admitted as temporary visitors from Mexico.

Of the approximately half million illegal aliens apprehended in fiscal 1973, virtually none were prosecuted, unless they presented counterfeit or altered documents or aided in smuggling endeavors.

This district has only 3% of the total length of land borders, and yet, fully 30% of all apprehensions of deportable aliens made in the United States are made within this district.

Almeida-Sanchez

Prior to the *Almeida-Sanchez* decision, it was clear in this Circuit that Border Patrol activities at fixed checkpoints were constitutional. *Fernandez* v. *United States,* 321 F. 2d 283 (9th Cir. 1963); *United States* v. *Barron,* 474 F. 2d 1215 (9th Cir. 1973, *cert. denied* 41 U.S.L.W. 3669 (June 25, 1973). Since *Almeida-Sanchez,* however, this area of the law has been characterized by extreme instability.

Although Justice White, for the dissent in *Almeida-Sanchez,* stated that it was not disputed that "warrantless searches for aliens without probable cause may be made at fixed checkpoints away from the border," (41 U.S.L.W. at 4977) and although Justice Powell stated that *Almeida-Sanchez* did not involve the "constitutional propriety of searches at permanent or temporary checkpoints removed from the border

or its functional equivalent," (41 U.S.L.W. at 4973) nevertheless the plurality's language and reasoning appears to require courts to address the question whether searches at the checkpoints are "border searches" as that term is defined in *Almeida-Sanchez*.

The plurality in *Almeida-Sanchez* rejected two arguments as bases for roving searches without probable cause and without search warrant: the "automobile search" line of cases, *Carroll* v. *United States*, 267 U.S. 132 (1925), et al. and the "administrative search" cases, *Camara* v. *Muncipal Court*, 387 U.S. 523 (1967) et al. Only a "border search" rationale could, according to the plurality, justify warrantless searches by immigration officers without probable cause.

That "border search" meant more than searches at the boundary between two countries is evidenced by Justice Stewart's resort to the enigmatic phrase "functional equivalent." Border searches may take place "not only at the border itself, but at its functional equivalent." 41 U.S.L.W. 4972.

The judicial inquiry which *Almeida-Sanchez* mandates, therefore, is whether a search is a border search since once it so finds a Court will not be required to determine whether the search is justified on the basis of a legally sufficient warrant or, if not, whether it is nonetheless proper under one of the exceptions to the warrant requirement.

The checkpoints in this District are by design located away from the United States-Mexico boundary line. To withstand constitutional attack they must, under the plurality's view, be located at the functional equivalent of the border. Functional equivalency is a slippery concept but it is this Court's obligation to give some substance to that term.

Justice Stewart, in aid of lower courts, provides examples of what is meant by functional equivalency. An established station near the border, a point mark-

ing the confluence of two or more roads that extend from the border, an international airport; these are the functional equivalents of the border. A relatively recent Fifth Circuit case, *United States* v. *Byrd*, 483 F. 2d 1196 (5th Cir. 1973), suggests yet another example of functional equivalency: where a geographical phenomenon, e.g., a river course, creates an "avenue for [the] entry of illegal aliens."

These specific examples suggest more generalized criteria. The international airport illustration indicates that the border or its functional equivalent is at the first effective point of entry. The "established station . . . near the border" example indicates a dual concern with intrusiveness and reasonable relation to the end pursued. The "confluence of two roads" illustration reveals the Supreme Court's manifest sensitivity to manpower shortages within the INS, and the Fifth Circuit's example demonstrates a concern with geography and local idiosyncracies.

Our judgment as to whether the checkpoints in the Southern District are at the functional equivalent of the border must be responsive to those concerns manifested by the plurality opinion and by the *Byrd* decisions—the latter echoing Mr. Justice Story's comment that "the court is bound to take notice of public facts and geographical positions; and that this remote part of the country has been infested, at different periods, by smugglers, is a matter of general notoriety. . . ." *In The Appollon*, 22 U.S. (9 Wheat.) 159, 164–65 (1824).

ANALYSIS OF THE OPERATION OF INDIVIDUAL TRAFFIC CHECKPOINTS

This Court next turns to a particularistic survey of each temporary or permanent checkpoint in this District in order to determine whether searches con-

ducted at those checkpoints are border searches as required by *Almeida-Sanchez*.

I. CHULA VISTA SECTOR CHECKPOINTS

A. SAN DIEGO COUNTY

San Diego County has a 70-mile border with Mexico. Proceeding east from the Pacific Ocean is the South Bay area which presents a serious obstacle to illegal alien traffic because of the military patrols at Ream Field, a U.S. Government installation. The slough of the Old Tijuana River is an additional barrier and effectively stops the illegal aliens from walking up the beach to the City of Coronado. East along the river bottom is agricultural land which, as you approach the San Ysidro port of entry, turns into a rapidly developing area with considerable freeway construction and a great congestion of traffic. East of the port of entry is an area with a series of deep finger canyons that cross the international boundary. These deep gullies provide natural conduits or avenues for illegal alien traffic. Continuing in an easterly direction, we find the Otay Mesa area which is a flat area extending to the foot of Otay Mountain. This rough terrain is a virtual sluiceway for the alien traffic. Between 150 and 200 apprehensions are made each night along this eight-mile section. Next is a very rough mountainous area from Otay Mountain, 3572′ in height, over to the Tecate gap. Just before getting to the Tecate port of entry (a City of 12,000 population), we find the Marron Valley area and 3,885 foot high Tecate Peak with several passes through the mountains easily accessible from Mexico. The very rugged terrain, east of Tecate, discourages all but the most physically vigorous alien. Further east is the Hipass area which is a high plateau with numerous trails and roads over which four-wheel drive vehicles

can move. Then at the line between San Diego and Imperial Counties, we find a rough and inhospitable area just before the escarpment drops off into the Imperial Valley.

The actual international border is marked, when possible, by a five strand barbed wire fence, but at no place does the fence constitute an effective barrier.

North of the border is the area where the illegal aliens, having walked across or otherwise entered this country, are picked up in vehicles. This zone of pickup spots and drop houses includes the South Bay area (Imperial Beach), the City of Chula Vista and the farm roads on Otay Mesa and on Highway 94. The South Bay area and Chula Vista are the densely populated southern suburbs of the City of San Diego, the second largest city in population in California.

San Diego and the area lying just east of San Diego is densely populated. Further east, however, the population becomes very sparse as you enter the rugged mountain areas.

North of San Diego are the northern suburbs of the city, with the populated areas becoming very few once we pass north of the City of Oceanside and Escondido.

North of Oceanside, Camp Pendleton, the U.S. Marine base, occupies almost all the space between the mountains to the east and the ocean to the west.

The location of Camp Pendleton and the mountains of eastern San Diego County act to funnel all northerly traffic along Interstate Routes 5, 15 and State Route 79. Traffic of any kind through the Marine Camp is carefully regulated and the Camp itself is under 24 hour patrol.

B. SAN CLEMENTE CHECKPOINT (ROUTE I–5)

On Interstate Routh 5, north of Oceanside, approximately 62 air miles and 66 road miles from the bor-

der is a permanent U.S. Border Patrol checkpoint on a stretch of road which is straight and provides a good view of the checkpoint to oncoming traffic.

This checkpoint is the primary, or cornerstone, checkpoint maintained by the Border Patrol in this District. Over 12,000 deportable aliens were apprehended there alone in fiscal year 1973. The daily logs of this checkpoint from January through August 1973 show that it is an unusual 8 hour shift that does not result in a least 20 or 30 apprehensions. This checkpoint is in operation approximately 60 to 70 percent of the time.

Approximately one mile south of the checkpoint is a large black on yellow sign with flashing yellow lights over the highway stating "All Vehicles, Stop Ahead, 1 Mile." Three-quarters of a mile further north are two black on yellow signs suspended over the highway with flashing lights stating "Watch For Brake Lights." At the checkpoint, which is also the location of a State of California weighing station, are two large signs with flashing red lights suspended over the highway. These signs each state "Stop Here—U.S. Officers". Placed on the highway are a number of orange traffic cones funneling traffic into two lanes where a Border Patrol agent in full dress uniform, standing behind a white on red "Stop" sign checks traffic. Blocking traffic in the unused lanes are official U.S. Border Patrol vehicles with flashing red lights. In addition, there is a permanent building which houses the Border Patrol office and temporary detention facilities. There are also floodlights for nighttime operation.

At the point of the checkpoint's location on the west is a very narrow strip of land which then drops off to the Pacific Ocean, while on the east is Camp Pendleton Marine Base. Camp Pendleton is heavily patrolled by the Provost Marshal and does not have

any direct roads through it. Consequently, all northbound traffic is funneled through one of the three checkpoints in the Chula Vista sector, with the majority going through San Clemente.

While there is a great deal of commuter traffic south of Oceanside, the traffic at the Interstate 5 checkpoint is predominantly inter-city with few commuter vehicles passing through. Also, at this location the volume of traffic is the lowest of any point on Route 5 between San Diego and Los Angeles. The traffic flow between Los Angeles and San Diego resembles a barbell with Los Angeles and San Diego forming the weighted portions and the I–5 checkpoint being the point least burdensome to traffic along the connecting bar.

San Clemente's operating procedure is unlike any other checkpoint operated in this District. The agent on the point does not converse with the occupants of the vehicles as a general rule, instead, he checks the traffic visually and directs those vehicles he believes needs further inspection to the side of the road, where another officer makes further inquiry regarding the status of the occupants. At San Clemente approximately 3% of the vehicles are actually stopped and directed off the side of the road for further inquiry and possible inspection.

To insure its effectiveness the Border Patrol attempts to operate this checkpoint around the clock every day of the week, but due to safety factors, such as traffic flow, and weather conditions, the checkpoint has not been operated on that basis in the recent past.

C. TEMECULA CHECKPOINT (INTERSTATE ROUTE 15)

This is a permanent checkpoint located on Interstate Route 15 (Old 395) approximately 64 air miles and 70 ground miles from the international border. Its location is north of the Temecula River and just

south of the junction of Route 15 with State Route 71 which comes in from the east.

The actual checkpoint is located at a point along a straight portion of Route 15 which provides a good view to the oncoming traffic. In operation the usual orange traffic cones channel the two lanes of traffic into one lane with the actual checkpoint being manned by an agent standing in the road. The checkpoint has a light pole which supplies electricity for floodlights for night operations and to supply the flashing red lights mounted on the Border Patrol vehicles which are parked on the side of the road.

During fiscal year 1973, the Temecula station reported that approximately 8,100 deportable aliens were apprehended during traffic checking operations. Reference to the detailed logs of activity for the first eight months of calendar 1973 reflects that virtually every shift which operated during this period apprehended deportable aliens. The apprehension of forty aliens during any one day of operation was not considered unusual.

While there is a great deal of commuter traffic south of Escondido, with bumper to bumper traffic on Route 15 at many places, the traffic volume at the Temecula checkpoint location is one of the lowest at any place along Route 15 from San Diego to Riverside, California.

The operating procedures at this checkpoint are much like all others, except San Clemente, in that the officer on point introduces himself with "Good morning, this is an immigration checkpoint. What is your citizenship, please?" After this and the response from the occupants the vehicle either is allowed to proceed or is detained for a short period to inspect the vehicle. The inspector generally takes no longer than two to three minutes. At Temecula the percentage of vehicles stopped for conversation ranges from 15 to 50

percent depending upon the volume of traffic, while the percentage of vehicles actually inspected would amount to about 5 percent of all vehicles.

D. OAK GROVE CHECKPOINT (STATE ROUTE 79)

This checkpoint is maintained on a straight portion of Highway 79 approximately 10 miles south of the Riverside County line and 56 air miles and 91 road miles from the Mexican border. It is maintained intermittently, being in operation no more than 20 percent of the time.

With the exception of a trailer, used as an office at this location, this checkpoint has the usual equipment and the operating procedures in regard to traffic handling are conducted as at Temecula. The percentage of vehicles which are stopped is close to 100 percent, with many of the stops being solely for an exchange of courtesies. This is made possible by the low volume of traffic on this highway. Highway 79 from Interstate 8 in San Diego to Riverside County has a very limited traffic flow and the number of vehicles passing through this checkpoint is one of the lowest of any place along this highway.

II. EL CENTRO SECTOR

A. IMPERIAL COUNTY

Imperial County lies to the east of San Diego County and extends to the California-Arizona border. The terrain along the border from San Diego, moving east is very rough, with rocks and canyons which are almost inaccessible. This is followed by a drop down to the desert, at sea level, which continues to approximately 10 miles west of Calexico where agricultural land begins with the All American Canal running adjacent to the boundary line. The farm land continues east for about 10 miles and then the

remaining area, extending to the California-Arizona border, is all sandy desert. The entire Mexican border adjacent to Imperial County is approximately 75 miles long with the only population of note being in Calexico, a City of about 18,000, on the California side, and Mexicali, the capital of Baja, California, with a population of approximately 400,000, being directly across the border from Calexico. The only fence along the boundary line is a limited five mile long length around the port of entry at Calexico.

The County has several areas which have been declared off-limits to the public in that they comprise U.S. Government reservations. The most significant of these is the aerial gunnery range in the Chocolate Mountains. The gunnery range encompasses a large part of the land area of Imperial County stretching from the Orocopia Mountains in the North along the Coachella Canal (which runs Northeast of the Salton Sea) and as far Southeast as Highway 78. Other natural geographic features are the Salton Sea in the northwest portion of the county which is 45 miles long and 15 miles wide, and the two large desert regions in the county. East of the East Highland Canal are sand hills which cover an entirely desolate desert area with virtually no inhabitants whatsoever. In the western part of the County is also uninhabited desert from the Salton Sea south to the Mexican border. The population of Imperial County is situated in the center of the County where there is a large concentration of excellent farm land. Through this entire region there runs a number of parallel roads northward which funnel eastbound traffic onto Routes 78 and Interstate 8 to Arizona and onto Routes 86 and 111 to the northwest towards Riverside and Los Angeles. Because of the natural configuration of the land and the establishment of the gunnery range, there are only

a few roads which can be taken by the average vehicle to areas lying north or east of the County.

B. STATE ROUTE 86

The Border Patrol has established a checkpoint on Route 86 west of the Salton Sea National Wildlife Refuge just north of the intersection of State Route 78. This location is approximately 36 air miles and 49 road miles from the Mexican border. The checkpoint is bordered on the east by farm land extending for about three miles to the Salton Sea. To the west and south of this checkpoint lies desert.

At this location the Border Patrol has a building and traffic check signs together with blinker lights. A power source is located at the facility. The signs are of the usual type and the floodlights at night cause the area to be very well lit. As can be seen from photographs introduced by the government, the area is desolate country with virtually no inhabitants between the checkpoint and the border.

The Border Patrol attempts to keep this checkpoint operating on a 24-hour basis and in fiscal 1973 they operated around 6,000 hours which is approximately 65 to 70 percent of the time.

At this checkpoint the checking operations are of the usual type with about 75 percent of the vehicles traveling through it being stopped for inquiry with around 10 percent to 15 percent of all vehicles being detained for further inspection. It is estimated that over half of the vehicles at this checkpoint have come directly from Mexicali or have occupants who walked across the border at Calexico.

During the first ten months of calendar year 1973 approximately 690 deportable aliens were apprehended at this checkpoint according to the detailed traffic logs maintained by the Border Patrol.

This checkpoint is located on a point with one of the lowest volumes of traffic along Route 86 north of the population centers of Calexico, Brawley and El Centro.

C. ROUTE 111

On State Route 111 seven miles north of Niland, California, between the Salton Sea and the Chocolate Mountain Aerial Gunnery Range, and approximately 44 air miles and 51 road miles from the Mexican border, is another fixed checkpoint.

This checkpoint and that on Route 86 constitute the major traffic checkpoint operations in Imperial County and are geared to check all northbound traffic leaving the border region in a northwesterly direction.

Traffic logs reveal that for the first ten months of calendar year 1973 approximately 730 deportable aliens were apprehended at this location, which has the lowest volume of traffic of any point on Route 111.

The operating procedures at this checkpoint are much like its Salton Sea companion on Route 86, with approximately 75 percent of all vehicles being stopped for a limited verbal inquiry and approximately 10 percent of all vehicles being given some type of cursory inspection before resuming their journey northward.

The physical arrangement of the checkpoint is in accord with official policy in that the checkpoint has all the usual equipment including nighttime lighting facilities.

D. HIGHWAY 78 AT OGILBY ROAD

The Border Patrol also maintains a checkpoint on Highway 78 just north of the juncture of Ogilby Road and approximately 12 miles northeast of Glamis, California. This checkpoint is about 31 air miles and 37 ground miles from the Mexican border. Ogilby Road has recently been paved and it extends directly

from Interstate Route 8 which at the point of that intersection is about three miles from the international boundary line.

This checkpoint has the usual accessories, including a portable light plant, and is operated like the checkpoints at Routes 86 and 111, with approximately 75 percent of all vehicles being subject to some limited inquiry.

During fiscal year 1973 the checkpoint was operated for about 2,000 hours while during the first ten months of calendar year 1973 over 660 deportable aliens were apprehended at this checkpoint.

The location of the checkpoint is east of the Navy Gunnery Range and, in conjunction with the Route 111 checkpoint, serves to straddle that government reservation. This location on Highway 78 has an estimated northbound traffic volume of around 450 vehicles daily and has almost the least traffic on Route 78 from its junction with Route 111 in Brawley to its end at Interstate Route 10 near Blythe, California. The terrain in the immediate area and south of this checkpoint is that of virtually uninhabitable desert.

E. ROUTE S–22

The Border Patrol operates a checkpoint on Route S–22 west of Salton City located approximately 45 air miles and 71 ground miles from the Mexican border. Route S–22 is the only route east of Route 79 coming from San Diego County which provides egress from that county, and it runs just north of the fossil beds in the West Imperial County desert.

The operation of the checkpoint is basically the same as that of the checkpoint on Route 78 with warning signs, blinking red lights on the vehicles and with an electric power source for nighttime use.

This checkpoint is maintained, because Route S–22

otherwise could be used as a bypass around the Imperial County sector.

Operations at this fixed checkpoint are on about a 50 percent level and during the first ten months of calendar year 1973 almost 340 deportable aliens were apprehended at this checkpoint.

F. OTHER FIXED CHECKPOINTS

In addition to the four main checkpoints discussed above, the Border Patrol also operates other checkpoints in Imperial County on occasion.

1. The Border Patrol operates a checkpoint occasionally on a dirt road which parallels the Coachella Canal at a point north of the checkpoint on Route 111. This roadway could be used to circumvent or bypass the Route 111 highway and checkpoint and its operation is to avoid such usage. It is an extremely desolate area near the Navy Gunnery Range. Very few vehicles use the road, typically an average of around three or four vehicles during an eight hour period. The checkpoint is operated like the others in this sector, but with far less equipment.

2. On Route S–2 at the junction of Highway S–2 and Shell Canyon Road at Ocotillo, California, the Border Patrol occasionally maintains a fixed checkpoint. The terrain here is desolate desert with no homes in the area which is approximately 8 miles due north of the international boundary line with Mexico. Given the very light traffic on S–2 the checkpoint has a minimum of equipment on hand. During fiscal year 1973 this checkpoint was open only 200 or 250 hours and during the first ten months approximately 40 deportable aliens were apprehended at this checkpoint.

3. South of the S–2 checkpoint the Border Patrol occasionally maintains a checkpoint on Interstate 8 (I–8) approximately six miles west of Ocotillo, California. The operations here are only when the Border

Patrol has specific information of a smuggling effort coming out of the desert area. The equipment is of a portable nature. During the first ten months of calendar 1973 the checkpoint was in operation over 135 hours and almost 70 deportable aliens were apprehended.

4. In addition, the Border Patrol operates two checkpoints during the harvesting seasons for the purpose of checking the labor buses early in the morning to apprehend any illegal aliens who have evaded the line watch patrols. For convenience, these two checkpoints have been designated "A," located at the intersection of Cole Road and Highway 111 about one mile from the border, and "B," located on Highway 98 at the intersection of Interstate 8 about two miles from the border. The checkpoints are set up for only a few days during the year for a very short period, and yet the results normally produce apprehensions of 20 or 30 deportable aliens within a few hours each day. Traffic logs maintained for these agricultural bus checks on Highway 111 show 19½ hours of operation during October 1973, producing 100 apprehensions. In June 1973, the same checkpoint operated for only 16 hours and yet 103 deportable aliens were located.

CONCLUSION

Having analyzed with particularity the characteristics and operating procedures of each of the checkpoints within this District, we turn now to measure each checkpoint against the "border search" definition of *Almeida-Sanchez.*

Previously we have noted that under *Almeida-Sanchez,* border searches are those which take place at the first effective point of entry subject to the tests of intrusiveness and reasonable relation to the end pursued and to due consideration for geographic characteristics and available manpower resources.

The San Clemente checkpoint is constitutional under these criteria. It is located at the point at which traffic volume is the lowest along the main artery connecting Los Angeles with San Diego. California Dept. of Public Works, Div. of Highways, *1972 Traffic Volumes on the California Highway System*, 19 (1972). The checkpoint entails for the average motorist nothing more than a fleeting stop; even for those vehicles selected for actual inspection the delay is slight. Bounded on the east by Camp Pendleton and on the west by the Pacific Ocean, the checkpoint straddles a natural corridor along which illegal aliens frequently travel in their migration towards the labor markets in the north. Even though the checkpoint is in operation for less than 24 hours per day, it is a permanent checkpoint in that it never varies with respect to location and closes only in response to heavy traffic or adverse weather conditions—circumstances both of which affect the safety of the stop and its intrusiveness.[3]

The San Clemente checkpoint is the cornerstone of the checkpoint system. Once the checkpoint along Interstate 5 is designated, the various other checkpoints fall into place since each checkpoint relates to all others in such a manner as to preclude evasion by the use of bypass roads. Clearly there is no one spot which

[3] The Government argues that San Clemente as well as the other checkpoints in this District meet Justice Powell's requirements for the equivalent of probable cause. Furthermore, citing *United States* v. *Schafer*, 461 F. 2d 856 (9th Cir. 1972), the Government contends that having established the equivalent of probable cause no warrant is required because of the "inherent distinction" between roving searches (where Justice Powell would require an area search warrant) and checkpoint searches. In view of our holding that the checkpoints are the functional equivalents of the border, however, we need not consider this argument.

is constitutionally mandated to fix a checkpoint. Rather there is a constitutionally permissible zone within which the jealously guarded Fourth Amendment rights and legitimate needs of law enforcement can coexist. San Clemente is within that zone.

Likewise, the Temecula checkpoint is within the constitutionally permissible zone. Although not situated at the least intrusive point along Interstate 5, the Temecula checkpoint's location is largely dependent on the positioning of the Interstate 5 checkpoint and on the existence of bypass routes, such as State Highway 71 and County Route 16, which otherwise would compromise the integrity of the checkpoint system. No two checkpoints screening traffic along the westernmost and middle routes of the Chula Vista Sector which illegal aliens frequently follow to the north could be chosen which together interfere less with highway traffic yet avoid circumvention by sophisticated alien smugglers.

The Temecula checkpoint is also a permanent checkpoint. It is constant with respect to location; while it operates less than 24 hours per day it does operate for substantial periods of time. The checkpoint is located along the second major conduit in the Chula Vista Sector to the Los Angeles area as evidenced by the large numbers of illegal aliens apprehended at Temecula.

The third checkpoint within the Chula Vista Sector is the Oak Grove checkpoint. Oak Grove is a temporary checkpoint even though it is consistently located at or about the same spot along State Route 79. Oak Grove is operated, however, only about 20 percent of the time. Although Justice Stewart's opinion classifies checkpoints in terms of temporary and permanent, we see no constitutional issue turning on that distinction. We note, however, that we do not have before us a case where the checkpoint varies substantially both in

terms of location and time of operation. Oak Grove while temporary in time is fixed in location and, therefore is not constitutionally distinguishable from the other fixed checkpoints of San Clemente or Temecula.

In view of the trickle of traffic moving on Highway 79 from Interstate 8 to Riverside, Oak Grove does not interfere with any significant movement of the public. Nevertheless, the geographic contours of the area are such that this area is the third gate to the north within the Chula Vista Sector. The exact location of Oak Grove is nearly predetermined by the location of the other two checkpoints within this sector. If the Oak Grove checkpoint were moved closer to the border, smugglers could easily bypass the station by driving along the routes leading to the San Clemente or Temecula checkpoint and merely turning east as soon as they reached a point north of Oak Grove.

The checkpoints in the Chula Vista Sector reenforce each other and each prevents the circumvention of any other checkpoint; they are a system and one cannot be tampered without affecting the positioning of the others. Once Interstate 5 is positioned, the options for establishing other checkpoints are severely reduced. In addition, one must keep in mind that checkpoints are also established to police the limitations of I–186 cards, i.e. restriction on alien passage to within 25 miles north of the border and for 72 hours. In view of all the circumstances, we hold that the Chula Vista Sector checkpoints are at the functional equivalent of the border.

The fixed checkpoints in Imperial County not only tend to ensnare those unwary illegal aliens who have crossed the international boundary into Imperial County at a point other than a formal border crossing, but also serve to confront, detect and apprehend

illegal entrants who have crossed the boundary into San Diego County and attempt to evade confronting the checkpoints there by swinging east into Imperial County, from there intending to move northward. In this regard it must once more be observed that the checkpoints in the Southern District ought to be conceptualized as parts of a systemic, integrated whole in which each part is, to some extent, interdependent upon the functioning of the other parts.

The checkpoint on Route 86 is situated at a point with one of the lowest volumes of traffic on that highway, thus tending to cause little intrusion and inconvenience to travelers, as well as scarcely impeding the goal of safe driving. This checkpoint is not easy to intentionally circumvent without being steered into another checkpoint on another highway, in that it is bordered by the Salton Sea on one side and desert on the other. It lies just 36 air miles from the Mexican border and it has been estimated that over half of the vehicles reaching this checkpoint have come directly fom Mexicali, B.C., Mexico. Accordingly, the Court finds that this checkpoint constitutes a functional equivalent of the border.

The checkpoint on Route 111 also is located such that it is not easily bypassed, lying between the Salton Sea and the Chocolate Mountain Aerial Gunnery Range. Traffic logs indicate that this particular location has the lowest volume of traffic of any point on this highway, thus making this checkpoint as minimally intrusive and inconvenient to the innocent as a checkpoint could be on this highway. This checkpoint, lying 44 air miles from the border, complements the checkpoint on Route 86, thus together constituting the major traffic checkpoint operations in Imperial County. The Court finds this checkpoint to be the functional equivalent of the border.

The checkpoint on Route 78 is situated just north of its junction with Ogilby Road, a paved road which commences about 3 miles from the border and then extends northward for some 24 miles through no towns and utterly barren desert. This checkpoint, lying about 31 air miles from the border is located, then, immediately after the confluence of two highways leading north from the border. In that this checkpoint is adjacent to the Aerial Gunnery Range and surrounded on all other sides by virtually uninhabitable desert, it is not easily circumvented by one seeking to avoid detection by moving in a northeasterly direction from the border. It is located at almost the least-traveled spot on Route 78 between Brawley and Blythe, California, where Route 78 ends. Thus, there is little intrusion and inconvenience to innocent travelers on this highway caused by the checkpoint. The Court finds it to be the functional equivalent of the border.

Route S–22, west of Salton City, California, is the site of a checkpoint located about 45 air miles from the border. This highway, running east and west, provides egress from San Diego County for those illegal entrants who might be endeavoring to bypass checkpoints in that county, as well as the more southerly checkpoints in Imperial County. So situated, it complements the network of checkpoints to the west in San Diego County, rendering them more effective. The Court finds this checkpoint to be the functional equivalent of the border.

Though the above-listed and discussed checkpoints constitute the primary part of the checkpoint scheme in Imperial County, there are a number of infrequently-operated, temporary checkpoints occasionally utilized in the County. These checkpoints have been cited and discussed on pages 31 and 32, above, under

the subheading "OTHER FIXED CHECK-POINTS."

The checkpoint on the dirt road parallelling the Coachella Canal constitutes a manifestly insignificant intrusion on the travelling public, with only three or four vehicles per eight hours passing by on the average. This checkpoint is designed to thwart those entrants who would evade the Route 111 checkpoint. Thus it complements the efficacy of that checkpoint. The two checkpoints together would be difficult to bypass, the Salton Sea being on one side of them and the Aerial Gunnery Range on the other. The Court finds this temporary checkpoint to be the functional equivalent of the border.

The temporary checkpoint on Route S–2 and Shell Canyon Road at Ocotillo, California, lies only 8 miles north of the border. The terrain consists of desert and there are no homes in the area. Nor are there any other towns in the vicinity. Due to its extreme proximity to the border and distance from the nearest border crossing, the Court finds this checkpoint to be the functional equivalent of the border.

The checkpoint established occasionally on Interstate 8, six miles west of Ocotillo, is only about five miles from the border with no homes or towns in between. As a matter of practical fact, this checkpoint is operated only when the Border Patrol acquires information indicating a smuggling effort is proceeding in that direction and thus, perhaps, probable cause to stop and question may well often be established by such information. In any event, due to its proximity to the border, the lack of anything except desert in between the checkpoint and the border, and the distance of about 35 air miles from the nearest formal border crossing, the Court is convinced that this temporary checkpoint is also the functional equivalent of the border.

The checkpoints operating briefly each year during the harvesting seasons, lying respectively only one and two miles from the border, checking the early morning labor buses, result typically in 20 to 30 apprehensions of illegal entrants within a few hours each morning of operation. Due, again, to the proximity to the border of these checkpoints and the very limited intrusiveness and inconvenience (as with all of these temporary checkpoints), as well as the specificity of information being acted upon, the Court finds these two checkpoints to be the functional equivalent of the border.

HOWARD B. TURRENTINE,
United States District Judge.

Dated: December 5, 1973.
Copy to: All Counsel.

APPENDIX D

United States District Court for the Southern District of California

(Criminal Case No. 16360)

UNITED STATES OF AMERICA, PLAINTIFF

v.

LUIS ANTONIO ORTIZ, DEFENDANT

STIPULATION

(Honorable EDWARD SCHWARTZ.)

United States of America, by and through its counsel, Assistant United States Attorney Michael E. Quinton, and the defendant, Luis Antonio Ortiz, by and through his counsel, Frank Ragen, hereby stipulate and agree that if the following named witnesses were called during the trial of the defendant, each would testify as follows:

Emilio Rivas-Jimenez, Arturo Rivas-Jimenez and Buenaventura Ytza-Oxte would testify that each of them is a resident and citizen of Mexico, who was born in Mexico and has no legal right to enter or to remain in the United States. Each of the above named aliens entered the United States within the last three years.

The defendant on November 12, 1973 in or around Oceanside, California, placed the three above-named aliens in the trunk of the automobile and drove them to the San Clemente Checkpoint where all of them were arrested by a Border Patrol agent.

It is further stipulated that the above stipulation

of testimony of Emilio Rivas-Jimenez, Arturo Rivas-Jimenez and Buenaventura Ytza-Oxte may be admitted at the trial of Criminal Case No. 16360 as evidence against the defendant, Luis Antonio Ortiz, or in any other criminal proceeding before the courts of the United States concerning Criminal Case No. 16360. The defendant, Luis Antonio Ortiz, hereby waives his right to confront and cross-examine Emilio Rivas-Jimenez, Arturo Rivas-Jimenez and Buenaventura Ytza-Oxte at trial or in any other proceeding.

It is further stipulated that the three above-named aliens may be released from custody as material witnesses and need not be held to testify on behalf of the defendant, Luis Antonio Ortiz.

Border Patrol Agents Francis, Buchert and Davenport would testify that on November 12, 1973, each is an agent of the United States Border Patrol, a division of the Immigration and Naturalization Service of the United States Department of Justice.

Border Patrol Agents Francis, Buchert and Davenport would testify that each and every one of them of them was on duty at the United States Border Patrol Immigration Checkpoint at San Clemente, California. On that date, the defendant, Luis Antonio Ortiz, was observed to be driving a 1969 Chevrolet sedan, California license number XXK 600 northward on Interstate Highway 5 toward Los Angeles. The vehicle driven by the defendant was referred to the secondary inspection area of the Border Patrol checkpoint, the trunk of the automobile was opened by the Border Patrol and Emilio Rivas-Jimenez, Arturo Rivas-Jimenez and Buenaventure Ytza-Oxte were found concealed inside the trunk of the automobile.

The defendant, Luis Antonio Ortiz, waives his right to confront and cross-examine Border Patrol Agents Francis, Buchert, and Davenport regarding their testimony and hereby stipulates that the above sum-

mary of their testimony may be admitted at the trial of Criminal Case No. 16360 as evidence in that case or in any other criminal proceeding before the courts of the United States concerning Criminal Case No. 16360.

Dated: December 4, 1973.

Respectfully submitted.

FRANK J. RAGEN,
Attorney for the Defendant,
MICHAEL E. QUINTON,
Assistant U.S. Attorney,
LUIS ANTONIO ORTIZ.

It is so Ordered.

Dated: December 5, 1973.

EDWARD J. SCHWARTZ,
United States District Judge.

APPENDIX E

EXCERPT FROM TRANSCRIPT OF TRIAL PROCEEDINGS

DECEMBER 5, 1973

The COURT: On the basis of the evidence submitted pursuant to the stipulation, it will be the finding of the Court that the defendant is guilty beyond a reasonable doubt of the charges contained in Indictment No. 1630, in Counts 5, 6, and 7 thereof, which pertain to the aliens who are named in the stipulation and whose testimony is received pursuant to the stipulation.

The testimony, of course, of the Border Patrol Agents Francis, Buchert, and Davenport is also received pursuant to the stipulation.

It appears that the three aliens named in Counts 5, 6, and 7, namely, Buenaventura Ytza-Oxte, Arturo Rivas-Jimenez and Emilio Rivas-Jimenez, were placed by the defendant, on November the 12th, 1973, near Oceanside, in the trunk of an automobile driven by the defendant and the automobile was then driven to the San Clemente checkpoint, where the vehicle was referred to the secondary inspection area and the trunk thereof opened and the three named aliens were found concealed inside the trunk of the automobile.

I would hold that the San Clemente checkpoint is a permanent checkpoint and that the stopping of the vehicle and the search by the Border Patrol was a valid, legal search.

The Court also, from the facts presented in evidence, and particularly the concealment of the three aliens inside the trunk of the automobile, would infer

the necessary knowledge on the part of the defendant, that they were illegally in the United States and that their entry into the United States occurred less than three years prior to November 12, 1973, that they are in fact and were at that time illegal aliens who had no legal right to be in the United States, and that each of them was being illegally transported by the defendant in violation of Title 8, United States Code Section 1324(a)(2).

* * * * *

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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-2050

UNITED STATES OF AMERICA, PETITIONER

v.

LUIS ANTONIO ORTIZ

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1A)[1] is not yet reported. The opinion of the district court (Pet. App. 5A-41A) is reported at 368 F. Supp. 398.

JURISDICTION

The judgment of the court of appeals (Pet. App. 3A) was entered on June 19, 1974. The petition for a writ of certiorari was filed on July 19, 1974, and was granted on October 15, 1974. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

[1] This Court granted leave to dispense with the printing of a separate appendix. "Pet. App." refers to the appendix to the petition for a writ of certiorari.

QUESTIONS PRESENTED

1. Whether this Court's decision in *Almeida-Sanchez* v. *United States*, 413 U.S. 266—which held that a warrantless "roving patrol" search of an automobile for concealed aliens, conducted by Border Patrol officers acting without probable cause to believe that the vehicle contained any aliens, violated the Fourth Amendment's proscription against unreasonable searches and seizures—should be extended to invalidate a similar search for aliens at a fixed Border Patrol checkpoint.

2. Whether, if *Almeida-Sanchez* should be so extended, the extension should apply to checkpoint searches conducted prior to the date of the Ninth Circuit's decision in *United States* v. *Bowen*, 500 F. 2d 960, in which that court, overruling a long line of its prior decisions, held for the first time that warrantless checkpoint searches not based upon probable cause are unlawful.

STATUTE AND REGULATION INVOLVED

1. Section 287(a) of the Immigration and Nationality Act, 66 Stat. 233, 8 U.S.C. 1357(a), provides in pertinent part:

> Any officer or employee of the [Immigration and Naturalization] Service authorized under regulations prescribed by the Attorney General shall have power without warrant—
>
> (1) to interrogate any alien or person believed to be an alien as to his right to be or to remain in the United States;
>
> * * * * *
>
> (3) within a reasonable distance from any external boundary of the United States, to

board and search for aliens any vessel within the territorial waters of the United States and any railway car, aircraft, conveyance, or vehicle, and within a distance of twenty-five miles from any such external boundary to have access to private lands, but not dwellings, for the purpose of patrolling the border to prevent the illegal entry of aliens into the United States; * * *.

2. 8 C.F.R. 287.1 provides in pertinent part:

(a)(2) *Reasonable distance.* The term "reasonable distance," as used in section 287(a)(3) of the Act, means within 100 air miles from any external boundary of the United States or any shorter distance which may be fixed by the district director, or, so far as the power to board and search aircraft is concerned, any distance fixed pusuant to paragraph (b) of this section.

(b) *Reasonable distance; fixing by district directors.* In fixing distances not exceeding 100 air miles pursuant to paragraph (a) of this section, district directors shall take into consideration topography, confluence of arteries of transportation leading from external boundaries, density of population, possible inconvenience to the traveling public, types of conveyances used, and reliable information as to movements of persons effecting illegal entry into the United States: *Provided,* That whenever in the opinion of a district director a distance in his district of more than 100 air miles from any external boundary of the United States would because of unusual circumstances be reasonable, such district director shall forward a complete report with respect to the matter to

the Commissioner, who may, if he determines that such action is justified, declare such distance to be reasonable.

STATEMENT

After a non-jury trial in the United States District Court for the Southern District of California, respondent was convicted on three counts of transporting aliens who were present in this country illegally, in violation of 8 U.S.C. 1324(a)(2). He was sentenced to concurrent terms of imprisonment for three years. Execution of all but six months of the sentence was suspended, however, and respondent was placed on probation for three years.

1. The facts are contained in a stipulation (Pet. App. 43A–45A) and in the district court's findings based upon that stipulation (*id.* at 47A–48A). On November 12, 1973, near Oceanside, California, respondent placed three Mexican aliens in the trunk of his automobile and drove them north along Interstate Route 5. Respondent knew that each of the aliens was present in this country illegally and that each had entered within the prior three years.

The vehicle was stopped at the permanent Border Patrol immigration checkpoint on Interstate Route 5 near San Clemente, California, about 62 miles from the Mexican border (*id.* at 24A). Border Patrol officers directed respondent's automobile to the secondary inspection area at the side of the road. The officers there opened the trunk of the car and found the three aliens concealed inside.

2. Prior to trial, respondent moved to suppress the evidence derived from the search of his automobile.

He claimed, relying on this Court's decision in *Almeida-Sanchez* v. *United States*, 413 U.S. 266, that the evidence was the product of an unreasonable search and seizure.

The district court had previously issued an *en banc* general order providing for a limited consolidation of the "large number of criminal cases now pending before this court which involve the question of the impact of the recent Supreme Court decision in *Almeida-Sanchez* v. *United States*" on the validity of "searches conducted at checkpoints operated by the U.S. Border Patrol."[2] The court believed that a consolidated evidentiary hearing would expedite the ultimate disposition of the cases, foster the uniform application of the relevant legal principles, and "facilitate the presentation, by all interested parties, of any pertinent information which might aid the court in its eventual determination" (App., *infra*, p. 59).

District Judge Schwartz, to whom the present case was initially assigned, ordered that it be consolidated for an evidentiary hearing with the other pending cases under the court's general order. The consolidated proceeding was assigned to District Judge Turrentine. After several days of hearing, at which respondent was represented by counsel, Judge Turrentine issued a comprehensive opinion (Pet. App. 5A–41A) containing detailed findings on the causes and consequences of the widespread illegal entry of aliens from Mexico, the difficult law enforcement problems confronting the Border Patrol in its efforts

[2] The order is reproduced as an appendix to this brief, *infra*, pp. 59–60.

to maintain an effective deterrent and to apprehend illegal entrants, the role of the Border Patrol's fixed immigration checkpoints in the overall law enforcement program, and the placement and operating characteristics of each of the checkpoints in the Southern District of California.[3]

[3] In his Memorandum in Opposition in this case, respondent argued (pp. 1-2) that Judge Turrentine's opinion and the record compiled in the consolidated proceeding are not properly before this Court as part of the record in this case, because they were not physically transmitted to the court of appeals by the district court as part of the clerk's record. Rule 10(a) of the Federal Rules of Appellate Procedure, however, provides that "[t]he original papers and exhibits filed in the district court, the transcript of proceedings, if any, and a certified copy of the docket entries shall constitute the record on appeal in all cases." The rule makes no exceptions. Under Rule 11(f) the parties may stipulate "that designated parts of the record shall be retained in the district court * * *." But that rule also provides that "[t]he parts thus designated shall nevertheless be a part of the record on appeal for all purposes." The practice in the District Court for the Southern District of California is for counsel for each party to designate those portions of the record that should be physically transmitted to the court of appeals as part of the clerk's record. Where, as here, some items are not designated for physical transmission, the parties' written designation form amounts to a stipulation under Rule 11(f) that the items not designated shall be retained in the district court. Thus, while Judge Turrentine's opinion and the underlying transcripts and exhibits were not designated for transmission to the court of appeals in this case, Rule 11(f) makes clear that they are nevertheless "a part of the record on appeal for all purposes." It follows that they are part of the record for purposes of review by this Court on writ of certiorari.

Neither the clerk of the district court nor the clerk of the court of appeals has been able to locate the original copy of the transcript of the consolidated proceeding. We will therefore lodge with the Clerk of this Court our copy of the transcript. We have asked the clerk of the district court to transmit to

The court found that the San Clemente checkpoint "is the primary, or cornerstone, checkpoint maintained by the Border Patrol in this District" (*id.* at 25A), that "[o]ver 12,000 deportable aliens were apprehended there alone in fiscal year 1973" (*ibid.*), and that the checkpoint is located at "the point least burdensome to traffic" on Interstate Route 5 between San Diego and Los Angeles (*id.* at 26A).

The court considered it necessary, under the majority's opinion in *Almeida-Sanchez,* to determine with respect to each of the Border Patrol checkpoints in the district whether a warrantless vehicle search for aliens without probable cause could be justified as the "functional equivalent" of a border search. That determination, the court reasoned, rests on whether the search occurs at "the first effective point of entry" (*id.* at 34A), taking into account the intrusiveness of the search, its relationship to legitimate Border Patrol objectives, the geographic characteristics of the checkpoint, and the available manpower resources of the Border Patrol. The court held on the basis of these criteria that searches of vehicles for aliens at the San Clemente checkpoint are constitutionally permissible as the functional equivalent of border searches (*id.* at 35A).

Judge Turrentine did not, however, specifically rule on the individual validity of any of the searches that

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this Court, in connection with the petition for a writ of certiorari in *Baca* v. *United States*, No. 74-5307, the original exhibits introduced at the hearing. Counsel for respondent, John J. Cleary, Esquire, has agreed that this is the appropriate way to make the transcript and exhibits available to this Court.

had occurred in the 16 cases that were consolidated for the evidentiary hearing. That determination was left to the judge principally assigned to each case.

At the trial in the present case, held on the same day that Judge Turrentine's opinion in the consolidated cases was issued, Judge Schwartz denied respondent's motion to suppress. Although Judge Schwartz had been supplied with a copy of Judge Turrentine's opinion, he decided to "make the ruling on my own in this particular case" without waiting to study the opinion (Tr. 5).[4] He ruled that "the San Clemente checkpoint is a permanent checkpoint and that the stopping of the vehicle and the search by the Border Patrol was a valid, legal search" (Pet. App. 47A).

3. The court of appeals reversed on the authority of its *en banc* decision in *United States* v. *Bowen*, 500 F.

[4] Respondent stated in his Memorandum in Opposition in this case that, "[s]ince the trial court did not read or rely on" Judge Turrentine's opinion in the consolidated proceeding, that opinion "cannot be said to be the opinion of the district court below" (p. 2). He also stated in his Response to Motion to Dispense with the Requirement of an Appendix (p. 1) that he "objects to the consideration" of Judge Turrentine's opinion because it was not considered by Judge Schwartz when he ruled on the motion to suppress. As we have shown, however, Judge Turrentine's findings are based upon the record in the consolidated proceeding, at which respondent was represented by counsel. Respondent may disagree with those findings or may question their relevance to the issues in this case. But we cannot understand the basis of his contention that the opinion cannot be viewed as the opinion of the district court. The fact that Judge Schwartz ruled without studying Judge Turrentine's opinion does not mean the opinion is not part of the record in this case or that the findings contained therein cannot be relied upon by the parties in this Court.

2d 960, certiorari granted, October 15, 1974 (No. 73-6848), in which it had held by a 7-6 vote (1) that evidence seized in a warrantless, non-probable-cause, checkpoint search of an automobile for aliens—if conducted after June 21, 1973, the date of this Court's decision in *Almeida-Sanchez*—must be suppressed under the principles of that case unless the search can be said to be the "functional equivalent" of a border search, and (2) that "the search is a functional equivalent of a border search" only if it "takes place at a location where virtually everyone searched has just come from the other side of the border" or if it can be said with "reasonable certainty that the vehicle searched contained either goods which have just been smuggled or a person who had just crossed the border illegally" (500 F. 2d at 965-966).[5]

Since the search in the present case occurred on November 12, 1973, the panel held that the search was unlawful under *Bowen* and that "[t]he evidence (illegal aliens) discovered during the search should have been suppressed" (Pet. App. 1A). The court therefore reversed the judgment of conviction and, since the government would have "no case" without the aliens, directed that the indictment be dismissed (*ibid.*).

SUMMARY OF ARGUMENT

We contend that the judgment of the court of appeals should be reversed for two reasons. First, the search of respondent's automobile, though conducted

[5] The Ninth Circuit subsequently held that routine searches at the San Clemente checkpoint do not satisfy these standards and are not the functional equivalent of border searches. *United States* v. *Morgan*, 501 F. 2d 1351 (*en banc*).

without a warrant and without probable cause to believe that aliens were unlawfully concealed within the car's trunk, did not violate the Fourth Amendment's prohibition against unreasonable searches and seizures. Unlike the warrantless roving patrol search invalidated by this Court in *Almeida-Sanchez,* a limited search of a vehicle for aliens at a fixed immigration checkpoint does not depend for its reasonableness upon advance judicial approval of the checkpoint's operation. Second, even if this Court concludes that warrantless checkpoint searches are unlawful, the deterrent purposes of the evidentiary exclusionary rule would not be served by applying that sanction with respect to the search in this case, which was conducted in good faith reliance upon a long line of decisions in the Ninth Circuit upholding the constitutionality of routine checkpoint searches without a warrant, and which antedated the Ninth Circuit's decision overruling that line of cases.

I

Although "[t]he ultimate standard set forth in the Fourth Amendment is reasonableness" (*Cady* v. *Dombrowski,* 413 U.S. 433, 439), we recognize that "both the concept of probable cause and the requirement of a warrant bear on the reasonableness of a search" (*Almeida-Sanchez* v. *United States, supra,* 413 U.S. at 277, Mr. Justice Powell concurring). Taking all pertinent factors into account, the practice of checkpoint searches for aliens by the Border Patrol is not violative of the Fourth Amendment.

A. The search in this case, we submit, rests upon an area-wide "equivalent of probable cause" (*id.* at

279)—like that in *Camara* v. *Municipal Court*, 387 U.S. 523—which justifies the limited intrusions necessary to determine whether northbound vehicles in the Mexican border areas are carrying concealed aliens present in this country illegally. As we argued in *Almeida-Sanchez*, and as Mr. Justice Powell and the four dissenting Justices in that case recognized, the probable cause requirement for a limited search of vehicles in those areas may be satisfied even though the Border Patrol officers lack specific information casting suspicion upon the particular vehicle searched. To reject the notion of area-wide probable cause in this context and to adopt a requirement of specific probable cause for searches for aliens on roads near the border would seriously enfeeble any realistic program designed to deter the unauthorized entry of aliens into the United States and to apprehend illegally present aliens.

Of the million or more aliens present in this country illegally, about 85 percent are from Mexico. The length of our land border with Mexico and the sophisticated techniques used to smuggle aliens into this country make it impossible for the Border Patrol to combat unlawful entry solely at the border itself. Because the automobile is frequently the means used to transport illegal entrants inland to urban and agricultural job markets, Congress has authorized the Border Patrol to conduct limited searches of vehicles for aliens without warrants in the border areas. The Border Patrol's 47 traffic checkpoints, operated in the border areas pursuant to that authority, are highly effective both in apprehending illegally present aliens and in deterring illegal entry. The district court found

that "there is no reasonable or effective alternative method of detection and apprehension available to the Border Patrol" (Pet. App. 20A).

These essential checkpoint operations involve only a relatively modest intrusion upon the privacy interests of the traveling public. The checkpoints are located at points away from the flow of commuter and urban traffic. Most vehicles are permitted to pass through without stopping. Only about 8 percent are stopped for a routine inquiry concerning the citizenship of the vehicle's occupants, and only about 14 percent of those stopped are subjected to a limited inspection of those portions of a vehicle in which a human being could be concealed. At the San Clemente checkpoint, where respondent's vehicle was stopped, only about three percent of the vehicles are stopped for an inquiry of the occupants and for possible physical inspection of the car.

We submit, therefore, that the important public interest in deterring the illegal entry of aliens into this country and apprehending illegal entrants justifies the limited intrusions that occur at checkpoints. The stop and search of respondent's vehicle were incident to the reasonable operation of the San Clemente checkpoint, which the district court found to be "the primary, or cornerstone, checkpoint maintained by the Border Patrol" in southern California (Pet. App. 25A).

B. Though the search of respondent's vehicle was conducted without a warrant, we submit that it nevertheless did not violate the Fourth Amendment's proscription against unreasonable searches and seizures. While advance judicial approval may be deemed nec-

essary to ensure the reasonableness of a roving patrol search such as the one invalidated by this Court in *Almeida-Sanchez,* checkpoint operations are significantly different from roving patrol operations, and in view of those differences a warrant procedure for checkpoints would have little if any utility in enhancing the reasonableness of checkpoint searches.

In the first place, the network of checkpoints along the southwestern border is not the product of spontaneous decisions in reaction to specific factual perceptions of law enforcement officers (where the risk of arbitrary, capricious, or simply mistaken action is greatest), but is the result of careful study by relatively high-level officials of the Border Patrol. Moreover, frequent, periodic judicial approval of the operation of a particular checkpoint is unnecessary because the location and operating procedures of checkpoints do not vary substantially from day to day or even from month to month. Once the reasonableness of a checkpoint has been litigated in the context of a motion to suppress—or, as in this case, as part of a consolidated fact-finding proceeding—the court's determination would serve the same function that a warrant might otherwise serve by ensuring that the future operation of the same checkpoint is reasonable.

Furthermore, a warrant procedure is likely to be unworkable. Because the effectiveness of the Border Patrol's 47 traffic checkpoints depends upon coordination among the operations in neighboring sectors, an advance judicial determination of the reasonableness of one checkpoint would require consideration of information relating to others, including some that may be located in other judicial districts. A magistrate who

refused to issue a warrant for one checkpoint could disrupt the deterrent effectiveness of the entire system. That potential problem is likely to be intensified by the existing uncertainty in the lower federal courts concerning the validity of checkpoint warrants under the Fourth Amendment.

II

If this Court nevertheless determines that a warrantless checkpoint search violates the Fourth Amendment, we submit that the exclusionary rule should not be applied in this case. The search here was conducted after this Court's decision in *Almeida-Sanchez* but before the Ninth Circuit's *en banc* decision in *United States* v. *Bowen, supra,* in which that court overruled a long line of its own prior decisions upholding the constitutionality of the kind of search conducted here.

Almeida-Sanchez did not involve the validity of checkpoint searches, and the considered judgment of the Department of Justice was that the rationale of that decision did not extend to searches conducted at fixed checkpoints. Prior to the decision in *Bowen,* therefore, the Border Patrol continued to operate its checkpoints in the manner that the Ninth Circuit had repeatedly approved in the past. It was *Bowen,* not *Almeida-Sanchez,* that represented "a clear break with the past" (*Desist* v. *United States,* 394 U.S. 244, 248) insofar as checkpoint searches are concerned. The deterrent purpose underlying the exclusionary rule would, in these circumstances, not be served by applying that sanction with respect to a search conducted in good faith reliance on the law of the Ninth Circuit as it existed prior to *Bowen.*

It is not significant that *Bowen* was a court of appeals decision or that the law upon which reliance was placed was the law of the Ninth Circuit. This Court has held that a Supreme Court decision overruling established authority in a court of appeals can raise a retroactivity issue (*Chevron Oil Co.* v. *Huson,* 404 U.S. 97), and it is settled that a court of appeals may determine that one of its own decisions should not be applied retroactively.

ARGUMENT

I. A WARRANT IS NOT REQUIRED FOR A LIMITED SEARCH OF A VEHICLE FOR ALIENS AT A FIXED BORDER PATROL CHECKPOINT

This Court held in *Almeida-Sanchez* v. *United States, supra,* that a "roving patrol" search of an automobile for aliens, without probable cause or reasonable suspicion, is unlawful in the absence of a warrant. The majority stated, however, that "routine inspections and searches of individuals or conveyances seeking to cross our borders * * * may in certain circumstances take place not only at the border itself, but at its functional equivalents as well" (413 U.S. at 272). Thus, "searches at an established station near the border, at a point marking the confluence of two or more roads that extend from the border, might be functional equivalents of border searches" (*id.* at 272–273).

The district court in the present case, relying upon the majority's language in *Almeida-Sanchez,* found that routine searches for aliens at the San Clemente checkpoint are permissible because they are the functional equivalent of border searches (Pet. App. 35A). The Ninth Circuit subsequently held, however, based

upon its definition of "functional equivalent" in the *Bowen* opinion (see p. 9, *supra*), that the San Clemente checkpoint is *not* the functional equivalent of the border. *United States* v. *Morgan*, 501 F. 2d 1351 (*en banc*).

We now think that the Ninth Circuit's definition of "functional equivalent" is substantially correct and that a full-scale, border-type search of a vehicle for aliens or contraband may be conducted, other than at the border itself, only when it can be said with reasonable assurance under the circumstances that the vehicle or its contents have recently crossed the border. The Border Patrol, however, makes no claim of authority routinely to conduct full border searches at fixed inland checkpoints. It claims only the authority to conduct a limited inspection of those portions of a vehicle—usually in the trunk and perhaps under the hood, behind the back seat, or underneath the car—where a human being could reasonably be concealed. We accordingly do not and need not contend that the San Clemente checkpoint is the functional equivalent of the border.

The issue here, therefore, is the one left undecided in *Almeida-Sanchez*: "the constitutional propriety of searches at permanent or temporary checkpoints removed from the border or its functional equivalent" (413 U.S. at 276, Mr. Justice Powell concurring).[6] We contend that the Fourth Amendment does not prohibit the limited searches for aliens that are conducted

[6] Although the majority did not specifically address that issue, the four dissenting Justices, speaking through Mr. Justice White, stated that "apparently" it is not "disputed that warrantless searches for aliens without probable cause may be made at fixed checkpoints away from the border" (413 U.S. at 288).

without warrants at fixed checkpoints. Grounding our contention principally upon the reasoning of Mr. Justice Powell's concurring opinion in *Almeida-Sanchez*, we focus in this brief on the considerations underlying his conclusion in that case that the Border Patrol should "obtain advance judicial approval of the decision to conduct roving searches on a particular road or roads for a reasonable period of time" (413 U.S. at 283). It is our submission that those considerations do not apply with equal force in the context of searches for aliens at fixed checkpoints and that "advance judicial approval" is not essential to assure the reasonableness of the Border Patrol's checkpoint operations.[7]

A. THERE EXISTS AN AREA-WIDE EQUIVALENT OF PROBABLE CAUSE FOR THE LIMITED VEHICLE SEARCHES CONDUCTED AT FIXED CHECKPOINTS

The Fourth Amendment guarantees "[t]he right of the people to be secure * * * against unreasonable searches and seizures" and provides that "no warrants shall issue, but upon probable cause * * *." Although the two clauses are often considered intertwined, so that a search of private property may be deemed un-

[7] We are aware that Mr. Justice Powell joined the opinion of the Court in *Almeida-Sanchez*. We are also aware, however, that his vote was the decisive one in that case and that his separate concurring views there may hold the key to the outcome of the present case. While we therefore quite frankly address some of the arguments in this brief principally to Mr. Justice Powell, we do so in the belief that the views expressed in his concurring opinion in *Almeida-Sanchez* are not inconsistent with the views expressed in the majority opinion. To understand the narrow holding of *Almeida-Sanchez* requires, in our view, a reading of both the majority opinion and the concurring opinion.

reasonable unless authorized by a warrant issued upon a showing of probable cause, "reasonableness is still the ultimate standard." *Camara* v. *Municipal Court*, 387 U.S. 523, 539; *Cady* v. *Dombrowski*, 413 U.S. 433, 439. Thus, while "both the concept of probable cause and the requirement of a warrant bear on the reasonableness of a search" (*Almeida-Sanchez* v. *United States, supra*, 413 U.S. at 277, Mr. Justice Powell concurring), there are some circumstances in which a search may be reasonable even without a warrant and without probable cause.

In this portion of our brief, we put aside the question whether the absence of a warrant means that the checkpoint search in this case was unreasonable, and we discuss the manner in which the concept of probable cause bears on the reasonableness of the search. Although the checkpoint search in the present case was conducted without the particularized probable cause normally required for an automobile search, we submit that it was nonetheless reasonable because of the unique circumstances that exist in the area of this country's border with Mexico. The search of respondent's vehicle was an integral part of the Border Patrol's overall traffic checkpoint program in the border area, and that program, founded upon an area-wide "functional equivalent of probable cause" (*ibid.*), is itself reasonable under the Fourth Amendment.

1. Probable cause may be established on the basis of conditions in an area as a whole

Under this Court's decisions, the concept of probable cause is flexible. Its existence depends upon whether "a valid public interest justifies the intrusion contemplated" (*Camara* v. *Municipal Court, supra,*

387 U.S. at 539). In the usual case, the permissible reason to conduct a search must be focused with particularity upon the object of the search. But the Court has recognized that the probable cause requirement may be satisfied in some circumstances by knowledge of conditions in an "area as a whole" rather than by "specific knowledge" with respect to the particular object of the search (*id.* at 536, 538).

Camara involved a city-wide program of routine and periodic building inspections to identify housing code violations. This Court ruled that the constitutionality of any particular inspection turned not upon the existence of probable cause to believe that a violation would be uncovered in the particular building to be inspected, but upon the reasonableness of the inspection program itself. "[T]he agency's decision to conduct an area inspection is unavoidably based on its appraisal of conditions in the area as a whole, not on its knowledge of conditions in each particular building" (387 U.S. at 536). The Court held that, if entry to a particular building was refused, a warrant could be issued on the basis of this area-wide probable cause, "if reasonable legislative or administrative standards for conducting an area inspection are satisfied with respect to a particular dwelling" (*id.* at 538). See also *Colonnade Catering Corp.* v. *United States,* 397 U.S. 72; *United States* v. *Biswell,* 406 U.S. 311.

Similarly, as Mr. Justice Powell's concurring opinion in *Almeida-Sanchez* recognizes, the reasonableness of a search of an automobile for aliens does not necessarily depend upon the existence of probable cause to believe that a concealed alien will be found in that

automobile. Rather, "there may exist a constitutionally adequate equivalent of probable cause to conduct roving vehicular searches in border areas," "where the concentration of illegally present aliens is high, both in absolute terms and in proportion to the number of persons legally present" (413 U.S. at 279). In those circumstances, a limited search of a vehicle for aliens may be reasonable despite the absence of specific probable cause with respect to a particular vehicle, if the traffic inspection program as a whole is itself reasonable and if the particular inspection satisfies the criteria for conducting the area-wide program.

2. The special conditions in the area of the Mexican border give rise to an area-wide equivalent of probable cause to conduct limited searches of vehicles for aliens at established traffic checkpoints

The factors that persuaded Mr. Justice Powell in *Almeida-Sanchez* that "there may exist a constitutionally adequate equivalent of probable cause to conduct roving vehicular searches in border areas" (413 U.S. at 279)—"consistent judicial approval, absence of a reasonable alternative for the solution of a serious problem, and only a modest intrusion on those whose automobiles are searched" (*ibid.*)—exist with even greater force in the context of the Border Patrol's traffic checkpoint operations.

a. There is a high concentration of illegally present aliens in the Southwest border region

In the Mexican border area, as Mr. Justice Powell recognized, "the concentration of illegally present aliens is high, both in absolute terms and in proportion to the number of persons legally present" (413 U.S. at 279). The district court in the consolidated

proceeding in this case found that the number of aliens illegally present in this country is currently estimated as between 800,000 and 1,000,000, and about 85 percent of those aliens are citizens of Mexico (Pet. App. 7A).[8] The number has been growing rapidly. In the past decade, the number of deportable aliens apprehended by the Border Patrol nationally has increased more than ten-fold, from 38,861 in 1963 to 498,123 in fiscal year 1973 (*id.* at 12A).[9]

The essentially economic cause of this growing problem and its severe social and economic impact upon this country's Southwest region are explained in the district court's opinion (*id.* at 7A–10A). The court stated: "The net effect of this silent invasion of illegal aliens from Mexico is suffering by the aliens who are frequently victims of extortion, violence and sharp practices, displacement of American citizens and legally residing aliens from the labor market, and irritation between two neighboring countries" (*id.* at 10A). See generally Hearings before Subcommittee No. 1 of the House Committee on the Judiciary on Illegal Aliens, 92d Cong., 1st Sess.; Note, *Commuters, Illegals and American Farmworkers: The Need for a Broader Approach to Domestic Farm Labor Problems,* 48 N.Y.U. L. Rev. 440, 482–483 (1973).

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[8] Though the district court's figures correctly reflect the evidence in the consolidated proceeding, they may substantially understate the extent of the problem. The Commissioner of the Immigration and Naturalization Service recently stated that the number of aliens illegally present in this country is now estimated as "at least 6 or 7 million and is possibly as great as 10 or 12 million" (*U.S. News and World Report*, December 9, 1974, p. 77).

[9] The Border Patrol has informed us that the figure for fiscal year 1974 was 634,777, an increase of approximately 27 percent in one year.

b. The effective policing of our national boundaries to prevent the entry of unauthorized persons presents peculiar and difficult law enforcement problems

Because the problem of unlawful entry into this country exists principally in the Mexican border area, about 80 percent of the Border Patrol's 1,700 agents are assigned to that area. A large number of those agents are assigned to the "line watch," whereby those points most often used by border violators are kept under surveillance by officers on foot, in vehicles, or in observation aircraft. In certain active areas the Border Patrol has installed electronic equipment to detect unauthorized intrusions (see Pet. App. 13A). To seal means of egress from the immediate border area, officers routinely check transportation terminals, freight and passenger trains, and railroad yards.

Every effort is made to minimize the need to conduct alien detection activities inland by improving the efficiency of operations along the border, and the line watch is in fact effective, resulting in fiscal year 1973 in the apprehension of more than 175,000 deportable aliens (Pet. App. 13A). The great length of our land border with Mexico (nearly 2,000 miles), however, makes it impossible to detect and exclude at the border every alien who determines to enter this country unlawfully (*id.* at 13A–14A). Indeed, the district court found that "[i]ncreased manpower on line watch would not make that activity appreciably more effective" (*id.* at 14A).

As Mr. Justice Powell stated in his concurring opinion in *Almeida-Sanchez,* "it is the automobile which in most cases makes effective the attempts to smuggle aliens into this country" (413 U.S. at 279).

A common method employed by smugglers of aliens is to arrange for a group of aliens to cross the border illegally at a point away from an established port of entry and to have them make their way, often led by a guide furnished by the smuggler, to a predetermined spot where a vehicle will be waiting to transport them inland. See, for example, the facts in *United States* v. *Ketola,* 455 F. 2d 83 (C.A. 9), vacated and remanded, 409 U.S. 815, and in *Carranza-Chaidez* v. *United States,* 414 F. 2d 503 (C.A. 9). Experience shows that, once an illegal entrant has reached his inland destination, "it becomes very difficult to apprehend him" (Pet. App. 14A).

c. Traffic checkpoints are essential to the effective enforcement of the immigration laws in the border areas

In recognition of the Border Patrol's difficult law enforcement task, Congress determined in 1946 that authorized immigration officers should have the power to stop and search vehicles for aliens within a reasonable distance from the border without need for a warrant and without specific facts casting suspicion upon the particular vehicle to be stopped (60 Stat. 865).[10] The language of that enactment, with some modification, was carried forward in Section 287(a)(3) of the Immigration and Nationality Act of 1952, 66 Stat. 233, 8 U.S.C. 1357(a)(3), and it is in accordance with that express statutory authority that the Border Patrol conducts its present traffic checking operations. As Mr. Justice White stated in his dissenting opinion in *Almeida-Sanchez,* the authority conferred on immi-

[10] The meager legislative history is recounted in Mr. Justice White's dissenting opinion in *Almeida-Sanchez* (413 U.S. at 292–293).

gration officers by Section 287(a)(3) reflects "[t]he judgment of Congress * * * that there are circumstances in which it is reasonably necessary, in the enforcement of the immigration laws, to search vehicles * * *, without warrant or probable cause, and at locations other than at the border" (413 U.S. at 293).

We argued in *Almeida-Sanchez,* and the opinions of Mr. Justice Powell and the four dissenting Justices expressly recognized, that the roving patrol traffic checks involved in that case were an essential aspect of the Border Patrol's law enforcement program. Roving patrols, however, are used to supplement the fixed checkpoints, which constitute the principal deterrent to the inland transportation of illegally present aliens. As the district court found, "[t]he primary objective of the checkpoints is to intercept vehicles or conveyances transporting illegal aliens," and "the location of a checkpoint is determined by factors relevant to the interdiction or interception of deportable aliens who have succeeded in gaining entry in an unlawful manner or are proceeding beyond the immediate border area in violation of conditions of their admission as border crossers" (Pet. App. 15A).

Checkpoints are usually situated beyond the confluence of two or more roads leading from the border area.[11] This permits "the checking of a large volume

[11] For the Court's convenience, we have lodged with the Clerk for distribution to the Court two maps prepared by the Immigration and Naturalization Service. One shows the location of each Border Patrol checkpoint in the Southern District of California; the other shows the location of all the checkpoints in the Mexican border area. Copies of the maps have been furnished to counsel for respondent.

of traffic with a minimum number of officers" and "also avoids the inconvenience of repeated checking of commuter or urban traffic which would occur if the sites were operated on the network of roads leading from and through the more populated areas near the border" (*id.* at 15A). Most checkpoints are located more than 25 miles from the border "in order to control the unlawful movement into the interior" of non-resident border crossers who are restricted to visits within 25 miles of the border (*id.* at 16A).[12]

Sites that meet all of the Border Patrol's strategic criteria are used as "permanent" checkpoints. They "are equipped to handle a large volume of traffic on what would be a 24-hour basis except in cases of manpower shortage, poor weather, or where traffic becomes excessive causing a potential safety hazard" (*ibid.*). "Temporary" checkpoints are maintained on roads with less traffic and are operated "at irregular intervals and intermittently so as to confuse the potential violator" (*ibid.*).[13]

The checkpoints are highly effective. In fiscal year 1973, about 55,300 deportable aliens were apprehended through Border Patrol traffic checking operations, and

[12] Under 8 C.F.R. 212.6, a Mexican nonresident alien may enter this country as a nonimmigrant visitor pursuant to a border crossing card, Form I-186, which authorizes the holder to spend a maximum of 72 hours in the United States. The visit must be confined, however, to the "immediate border area," which is defined by the regulation as "within a distance of 25 miles from the Mexican border."

[13] The physical accouterments of both types of checkpoints and the manner in which Border Patrol officers check the traffic passing through them are detailed in the district court's opinion (Pet. App. 16A-18A). See page 28 and note 16, *infra*.

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most of those apprehensions took place at checkpoints (*id.* at 17A and n. 2). More than 12,000 deportable aliens were apprehended that year at the San Clemente checkpoint alone (*id.* at 25A).

The number of apprehensions, however, is not the sole or even the principal measure of a checkpoint's effectiveness. As the district court found, "the primary reason for their operation is that they effectively *deter* large numbers of aliens from illegally entering the country or violating the terms of any temporary border crossing card they may have" (*id.* at 18A; emphasis added). Were it not for the permanent and temporary checkpoints, there would be no effective deterrent to the already common smuggling technique of transporting illegal entrants inland in vehicles from points just this side of the border. As a practical matter, once the illegal entrants were safely in the trunk of an automobile or the back of a van, the Border Patrol would be powerless to intercept the illegal operation, and the aliens could easily be intermingled with the inland population.

Thus, like the roving patrols for which Mr. Justice Powell believed there could be an area-wide equivalent of probable cause, and like the unannounced inspections of firearms dealers upheld in *United States* v. *Biswell, supra,* the Border Patrol's checkpoint operations are "a crucial part" of the enforcement scheme essential to the maintenance of "a credible deterrent" (406 U.S. at 315, 316). As the district court found, "[t]he evidence presented before this court clearly establishes that there is no reasonable or effective alternative method of detection and apprehension available to the Border Patrol" (Pet. App. 20A).

d. The checkpoint operations are conducted primarily for administrative rather than prosecutorial purposes

As Mr. Justice Powell stated in *Almeida-Sanchez,* the Border Patrol's traffic checks "are undertaken primarily for administrative rather than prosecutorial purposes"; "their function is simply to locate those who are illegally here and to deport them" (413 U.S. at 278). Although the illegal entry and transportation of aliens may involve several criminal offenses,[14] the Border Patrol's primary mission has always been to prevent unlawful entries and to apprehend illegal entrants for deportation. Thus, as the district court found, "[o]f the approximately half million illegal aliens apprehended in fiscal 1973, virtually none were prosecuted, unless they presented counterfeit or altered documents or aided in smuggling endeavors" (Pet. App. 20A).

e. Checkpoint searches involve only a modest intrusion upon constitutionally protected interests

In terms of Fourth Amendment interests, this Court "has long distinguished between an automobile and a home or office" (*Chambers* v. *Maroney,* 399 U.S. 42, 48). As Mr. Justice Powell stated in *Almeida-Sanchez,* "[t]he search of an automobile is far less intrusive on the rights protected by the Fourth Amendment than the search of one's person or of a building" (413 U.S. at 279). And the Border Patrol's

[14] *E.g.,* 8 U.S.C. 1324 (harboring, transporting, inducing illegal entry); 8 U.S.C. 1325 (illegal entry); 8 U.S.C. 1326 (reentry of deported or excluded alien); 18 U.S.C. 911 (false representation as citizen); 18 U.S.C. 1546 (misuse of visas, permits, and other entry documents). See generally 2 Gordon and Rosenfield, *Immigration Law and Procedure,* §§ 9.22–9.40 (1974).

traffic checkpoint procedures are far less intrusive even than a full search of an automobile.

The typical operation of a checkpoint is described in the district court's opinion (Pet. App. 16A–17A):

> When the checkpoints, whether permanent or temporary, are in operation, an officer standing at the "point" in full dress uniform on the highway will view the decelerating oncoming vehicles and their passengers, and will visually determine whether he has reason to believe the occupants of the vehicle are aliens (i.e., "breaks the pattern" of usual traffic). If so, the vehicle will be stopped (if the traffic at the checkpoint is heavy, as at the San Clemente checkpoint, the vehicle will be actually directed off the highway) for inquiries to be made by the agent. If the agent does not have reason to believe that the vehicle approaching the checkpoint is carrying aliens, he may exchange salutations, or merely wave the vehicle through the checkpoint.
>
> If, after questioning the occupants, the agent then believes that illegal aliens may be secreted in the vehicle (because of a break in the "pattern" indicating the possibility of smuggling) he will inspect the vehicle by giving a cursory visual inspection of those areas of the vehicle not visible from the outside (i.e., trunk, interior portion of camper, etc.).

At the San Clemente checkpoint, where traffic is heavy, almost all vehicles are waved through without stopping. Only three percent of the vehicles are actually stopped and directed to the side of the road for inquiry regarding the status of the occupants and for possible inspection of the car (*id.* at 26A). The Border Patrol estimates that approximately 27.4 million

vehicles passed through its checkpoints in fiscal year 1974. Approximately 2.3 million of those vehicles, or about 8 percent, were stopped for brief questioning of the occupants. Of those vehicles stopped for questioning, approximately 320,000, or about 14 percent, were subjected to a physical inspection. Testimony in the consolidated proceeding before the district court showed that even those vehicles subjected to a physical inspection are ordinarily detained for only two to three minutes (R.T. 179).

Even the most thorough physical inspection of an automobile at a checkpoint is limited to those places where a human being could reasonably be concealed. In most instances, the officer will take only a brief look in the trunk of the car, though on occasion he may look under the hood, underneath the chassis, or perhaps behind the back seat (R.T. 331–332).[15] Except in cases when the limited questioning or inspection reveals facts constituting traditional probable cause, the officer conducts no search of the car's glove compartment or of ordinary suitcases, handbags, or containers, and the vehicle's occupants are subjected to no search of their persons.

f. Checkpoint searches have been consistently approved by the courts

As we show later in this brief (pp. 47–48, *infra*), checkpoint searches conducted pursuant to 8 U.S.C. 1357(a)(3) received consistent judicial approval,

[15] For a case in which an alien was found doubled up under the hood of an automobile, see *United States* v. *Ruiz-Juarez*, 456 F. 2d 1015 (C.A. 9). Several methods of concealing aliens in an automobile are illustrated by photographs introduced in evidence in the consolidated proceeding in the district court. See Govt. Exs. 16–26.

prior to this Court's decision in *Almeida-Sanchez,* by the courts of appeals in whose jurisdictions the checkpoints are operated.

g. The San Clemente checkpoint is reasonably operated as an essential element of the Border Patrol's traffic checking program, and the search of respondent's vehicle was properly conducted as part of the checkpoint's operations

The search of respondent's automobile took place at the San Clemente checkpoint. Located on Interstate Route 5 about 62 air miles and 66 road miles from the Mexican border, San Clemente "is the primary, or cornerstone, checkpoint maintained by the Border Patrol" in southern California (Pet. App. 25A). Together with the other checkpoints in the area, it forms a strategic network in which "each checkpoint relates to all others in such a manner as to preclude evasion by the use of bypass roads" (*id.* at 35A).

The San Clemente checkpoint is placed where "the volume of traffic is the lowest of any point on Route 5 between San Diego and Los Angeles" (*id.* at 26A). "While there is a great deal of commuter traffic south of Oceanside, the traffic at the Interstate 5 checkpoint is predominantly inter-city with few commuter vehicles passing through" (*ibid.*). The district court found that, "[b]ounded on the east by Camp Pendleton and on the west by the Pacific Ocean, the checkpoint straddles a natural corridor along which illegal aliens frequently travel in their migration towards the labor markets in the north" (*id.* at 35A).[16]

[16] The district court described the appearance of the checkpoint as follows (Pet. App. 25A):

Traffic checking operations at San Clemente are very productive. More than 12,000 deportable aliens were apprehended at the checkpoint in fiscal year 1973, and the district court found that it is common for an 8-hour shift to result in as many as 20 or 30 apprehensions (*id.* at 25A). The Border Patrol operates the San Clemente checkpoint around the clock except in times of heavy traffic or adverse weather conditions (*id.* at 26A, 35A). Although many vehicles pass through the checkpoint, only about three percent of them are stopped for even a brief inquiry concerning the citizenship of their occupants or for possible physical inspection (*id.* at 26A).

Thus, not only is the San Clemente checkpoint an integral and effective part of the network of checkpoints in the southern California area, but also it is located and operated in a manner reasonably designed to minimize disruption of and inconvenience to the innocent traveling public. The district court thus correctly concluded that it falls within the "constitu-

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"Approximately one mile south of the checkpoint is a large black on yellow sign with flashing yellow lights over the highway stating 'All Vehicles, Stop Ahead, 1 Mile.' Three-quarters of a mile further north are two black on yellow signs suspended over the highway with flashing lights stating 'Watch For Brake Lights.' At the checkpoint, which is also the location of a State of California weighing station, are two large signs with flashing red lights suspended over the highway. These signs each state 'Stop Here—U.S. Officers'. Placed on the highway are a number of orange traffic cones funneling traffic into two lanes where a Border Patrol agent in full dress uniform, standing behind a white on red 'Stop' sign checks traffic. Blocking traffic in the unused lanes are official U.S. Border Patrol vehicles with flashing red lights. In addition, there is a permanent building which houses the Border Patrol office and temporary detention facilities. There are also floodlights for nighttime operation."

tionally permissible zone within which the jealously guarded Fourth Amendment rights and legitimate needs of law enforcement can coexist" (*id.* at 36A).

The brief stipulation in this case does not reflect whether the Border Patrol officers who stopped and inspected the trunk of respondent's automobile had any specific, articulable basis for suspecting that his car contained concealed aliens. So far as this record shows, and there is no claim to the contrary, the stop and search were made routinely as part of the checkpoint's regular operation. Thus, while the officers may have lacked specific probable cause to stop respondent's vehicle, that stop, like the other routine stops made at the checkpoint, rests upon the area-wide probable cause that justifies the operation of the checkpoint itself.

Insofar as the concept of probable cause bears upon the reasonableness of the officers' actions in this case, therefore, we submit that the stop and search were reasonable under the Fourth Amendment, because "a valid public interest justifies the intrusion contemplated" by the operation of the San Clemente checkpoint, and "reasonable legislative or administrative standards for conducting an area inspection [were] satisfied with respect to [the] particular" search in this case (*Camara* v. *Municipal Court, supra,* 387 U.S. at 538, 539).

B. ADVANCE JUDICIAL APPROVAL FOR THE OPERATION OF A CHECKPOINT, THROUGH THE WARRANT PROCEDURE, WOULD NOT MATERIALLY ENHANCE THE REASONABLENESS OF THE LIMITED SEARCHES CONDUCTED AT THE CHECKPOINT; FOURTH AMENDMENT VALUES WOULD BE ADEQUATELY PROTECTED BY SUBSEQUENT JUDICIAL CONSIDERATION OF THE REASONABLENESS OF THE CHECKPOINT'S OPERATION IN THE CONTEXT OF MOTIONS TO SUPPRESS EVIDENCE

1. Much of what we have said in the foregoing discussion concerning area-wide probable cause we also said in our brief to this Court in *Almeida-Sanchez.* That does not mean, however, that we seek here to reargue issues that were decided against us in that case. On the contrary, we have only reiterated here so much of our argument in that case as the majority did not reject and as Mr. Justice Powell and the four dissenting Justices accepted—namely, that the special conditions in the Mexican border areas provide an area-wide "functional equivalent of probable cause" (413 U.S. at 277) that justifies the limited intrusions occasioned by the Border Patrol's traffic checking operations in that region.

The existence of "a constitutionally adequate equivalent of probable cause" (*id.* at 279) does not end the inquiry, however, because, as Mr. Justice Powell stated, "both the concept of probable cause *and* the requirement of a warrant bear on the reasonableness of a search" (*id.* at 277; emphasis added). In *Almeida-Sanchez,* therefore, the further question was whether requiring "a prior judicial determination" of the reasonableness of the Border Patrol's plan for a particular roving patrol operation would be an effective and feasible means of assuring that the plan represents a reasonable "balance[e] of the legitimate

interests of law enforcement with protected Fourth Amendment rights" (*id.* at 284).

Mr. Justice Powell concluded, rejecting our argument to the contrary, that advance judicial approval of a roving patrol operation would be feasible and effective, would not frustrate the government's purpose for the operation, and would materially enhance the reasonableness of a roving patrol search (413 U.S. at 279–285). He therefore joined the opinion of the Court, which held that a roving patrol search without a warrant was unreasonable under the Fourth Amendment.

We do not here urge the Court to reconsider its decision in *Almeida-Sanchez*. We do argue that there are significant differences between a roving patrol or "area search" operation (413 U.S. at 284) on the one hand and a fixed checkpoint operation on the other hand, and that those differences should lead to different results on the question of the need for a warrant.

We submit that prior judicial approval of a fixed checkpoint operation, in contrast to approval of a roving patrol operation, would add little to the reasonableness of the stops and limited searches conducted at the checkpoint. A *subsequent* judicial determination in connection with a motion to suppress evidence would adequately protect the right of the people under the Fourth Amendment "to be secure * * * against unreasonable searches and seizures * * *."

2. On a roving patrol operation, Border Patrol officers cruise in a patrol car in order to observe traffic in a prescribed area. When they see a vehicle that arouses their subjective suspicion, they pursue and

stop it and usually subject it to a search for concealed aliens. Roving patrols are usually conducted at night on infrequently traveled roads. The areas of operation may vary from season to season and even from night to night. By the nature of the operation, one roving patrol may be quite unlike another, even in the same area.

Checkpoint operations, by contrast, are conducted at stationary locations where officers ordinarily inspect only those vehicles that approach the checkpoint. Most checkpoints are located on major thoroughfares and are highly visible.[17] They are operated in daylight or at night under floodlights, in some cases on a 24-hour basis. The vehicle inspection procedure is regularized (Pet. App. 16A–17A), and one day's operation is essentially the same as any other's.

These differences between roving patrol and fixed

[17] The district court stated (Pet. App. 17A–18A): "In actual operation the checkpoints, be they 'permanent' or 'temporary,' have the same basic accounterments. Typically, about one-half mile to one mile south of the checkpoint is the first notification that the checkpoint is ahead. The notice is in the form of a black on yellow sign indicating 'STOP AHEAD' which has floodlights for nighttime illumination, *Handbook* at 9–9. Next, about 200 yards from the checkpoint is another sign cautioning the traffic to slow down or to be careful; this sign usually has flashing yellow lights attached. For the fifty yards directly south of the checkpoint there are placed traffic cones evenly spaced along each side of the highway. The actual checkpoint has a sign indicating to the traffic to stop, with official Border Patrol vehicles parked on each side of the stop zone showing the official Border Patrol emblem and/or the designation U.S. OFFICERS. At this point the agents assigned at the 'point,' in their official uniform, conduct checking and inspection operations. Beyond the checkpoint is usually a sign indicating 'THANK YOU.'"

checkpoint operations are significant for several reasons.

(a) First, because a checkpoint is stationary and its routine operation is consistent from day to day and even from year to year, there is little need for periodic *ex parte* judicial approval in *advance* of its operation during a particular week or month. The reasonableness of the checkpoint's operation can effectively be adjudicated for the first time in an adversary criminal proceeding, and, once the court has determined that the operation of a particular checkpoint is reasonable, that reasonableness would not be substantially enhanced by repeated approvals in advance of subsequent periods of operation.

We recognize that the determination whether to conduct a checkpoint operation "involves a balancing of legitimate interests of law enforcement with protected Fourth Amendment rights" and therefore "presents the type of delicate question of constitutional judgment which ought to be resolved by the Judiciary rather than the Executive" (413 U.S. at 284, Mr. Justice Powell concurring). In view of the special characteristics of fixed checkpoints, however, that judicial determination, once made for a particular checkpoint in the context of a motion to suppress, serves the same function that would be served in other circumstances by a warrant.

Since the reasonableness of the operation as a whole is the principal issue with respect to a checkpoint, and since the operation is ordinarily subject to no variation in terms of location and little if any in terms of operating procedure, an initial judicial determination

that a particular checkpoint search was reasonable can and should suffice to validate the future operation of the checkpoint as well.[18]

That is not to say that an aggrieved person may not thereafter allege and prove in a particular factual setting that the stop and search of his automobile was unlawful or that the checkpoint's operation is unreasonable. We submit, however, that the Fourth Amendment values at stake are adequately protected when those claims are adjudicated *after* a checkpoint search has been conducted and in the context of an adversary proceeding on specific facts.

The roving patrol situation is different. Since the circumstances of any particular operation are likely to be unique, prior approval of past operations is not necessarily an accurate measure of the reasonableness of the present one. Consequently, prior judicial approval of a roving patrol operation, based upon considerations such as those stated in Mr. Justice Powell's concurring opinion (413 U.S. at 283–284), may be viewed as a meaningful enhancement of the operation's reasonableness.

Whereas the "basic agency decision" (*id.* at 283) to operate a roving patrol in a particular area is made repeatedly, each time on the basis of varying factors, the basic decision to operate a checkpoint at a particular location is made only once, and the pertinent factors remain relatively unchanged in the absence of

[18] Indeed, the district court's opinion in the consolidated proceeding here amounts to a determination that the checkpoints in the southern California area are reasonably located and reasonably operated in light of the public interest involved and the nature and extent of the intrusions contemplated.

changed conditions, such as significant new highway construction. The significance of any such changed conditions can adequately be litigated on a motion to suppress. To require frequent, periodic *ex parte* presentations by the government to justify continuation of a checkpoint's operations would spend valuable judicial and administrative resources to achieve no important Fourth Amendment purpose.

We think it is also relevant that, since there is significantly less flexibility in the operation of a fixed checkpoint than in the operation of a roving patrol, there is correspondingly less need for judicial supervision of the manner and scope of the operation. The basic decisions regarding the establishment and manner of operation of the checkpoints are made by relatively high-ranking officials of the Border Patrol, and the occasions for arbitrary or capricious actions by the "cop on the beat" are correspondingly minimized. Accordingly, the procedures at a fixed checkpoint present less danger that Border Patrol officers will abuse what the majority in *Almeida-Sanchez* referred to as "unfettered discretion" (413 U.S. at 270). Cf. Note, *Automobile License Checks and the Fourth Amendment*, 60 Virginia L. Rev. 666, 670–672 (1974).

(b) Second, a warrant procedure for checkpoints is likely to be unworkable. The Border Patrol operates 17 permanent and 30 temporary checkpoints in California, Arizona, New Mexico, and Texas, within the jurisdiction of six different federal judicial districts.[19]

[19] Central District of California, Southern District of California, District of Arizona, District of New Mexico, Western District of Texas, Southern District of Texas.

Though spread over the entire southwest border region, the checkpoints form a cohesive network in which each is coordinated with others in the same vicinity. The deterrent effectiveness of the entire network depends upon that coordination.

As the district court found in the consolidated proceeding in this case, "[t]he placement of the checkpoints and their operations are coordinated between the two sectors located in this district and with Border Patrol activities to the east in Arizona" (Pet. App. 17A). Consequently, "the checkpoints in the Southern District ought to be conceptualized as parts of a systemic, integrated whole in which each part is, to some extent, interdependent upon the functioning of the other parts" (*id.* at 38A).

In the Chula Vista Sector in California, for example, where "[t]he San Clemente checkpoint is the cornerstone of the checkpoint system" (*id.* at 35A), its location determines the location of the others, because "each checkpoint relates to all others in such a manner as to preclude evasion by the use of bypass roads" (*ibid.*). Thus, "[t]he checkpoints in the Chula Vista Sector reenforce each other and each prevents the circumvention of any other checkpoint; they are a system and one cannot be tampered without affecting the positioning of the others" (*id.* at 37A).

The interrelationship of the Border Patrol's 47 checkpoints makes it difficult to conceive of a workable warrant procedure. For a court to review the basic agency decision to operate a particular checkpoint would require consideration of information relating not only to the checkpoint in question but also

to other checkpoints in the same sector [20] as well as checkpoints in neighboring sectors. Denial of a warrant for a particular checkpoint could seriously reduce the deterrent effectiveness of the entire system, and it may not always be possible to obtain prompt judicial approval of revised plans to compensate for the absence of a particular checkpoint.

Even if it would be feasible to seek warrants for all the checkpoints in a judicial district at one time—that is, to make periodic *ex parte* presentations of information such as that presented in an adversary context in the consolidated proceeding that included the present case—the magistrate or judge presumably could not issue warrants for any coordinate checkpoints located outside his judicial district (Rule 41(a), Fed. R. Crim. P.). The relationship between the checkpoints, however, does not end at the district boundary. If the magistrates in neighboring districts should take different views of the information presented to them, the coordination of the system, and its deterrent effectiveness as a whole, could be seriously disrupted. That risk of disruption would, of course, increase geometrically to the extent that warrants for each checkpoint must be justified and obtained separately from a variety of issuing magistrates.

(c) Disruptive denials of warrants may also result from the existing uncertainty concerning the lawfulness under the Fourth Amendment of the kind of area or checkpoint warrant that would be required. Although Mr. Justice Powell and the four dissent-

[20] There are nine Border Patrol "sectors" in the southwest region, each of which is headed by a Chief Patrol Agent.

ing Justices in *Almeida-Sanchez* expressly stated their view that such a warrant for roving patrol searches would pass constitutional muster (413 U.S. at 283–285, 288), the judges of the Southern District of California have reached conflicting decisions concerning the lawfulness of even a *stop* at a checkpoint pursuant to an area type warrant.[21]

(d) There is another practical problem. To maximize the effectiveness of the Border Patrol's overall traffic checking operations, experience has shown that the Chief Patrol Agent in each sector must retain flexibility in operating the various checkpoints within his jurisdiction. It is not always possible to anticipate when law enforcement strategy will require the operation of a particular checkpoint.

At times, specific information about expected smuggling activity, changed weather or manpower conditions, or perhaps just the seasoned judgment of an experienced patrol agent will indicate, for example, that a regular checkpoint should be shut down for an afternoon and an infrequently used temporary checkpoint be placed in operation. But the need may not arise frequently enough or with sufficient predicta-

[21] The issue was argued before a panel of the Ninth Circuit in several consolidated cases on November 5, 1974. *United States* v. *Martinez-Fuerte*, Nos. 74–2462, *et al.*

The warrants that have been obtained for checkpoints in the Southern District of California in the wake of the Ninth Circuit's decisions in *United States* v. *Bowen*, *supra*, and *United States* v. *Brignoni-Ponce*, 499 F. 2d 1109, have with few exceptions given the Border Patrol authority only to stop vehicles for purposes of inquiry. Searches have been made, therefore, only with consent or on the basis of probable cause. The warrants have uniformly been limited to periods of 10 days.

bility to justify seeking a warrant for it during any particular ten-day period. The effect of a warrant requirement in circumstances like these could be to confine the Border Patrol's enforcement efforts to those checkpoints operated regularly and thereby to diminish the effectiveness of the traffic checking operations as a whole. To that extent, it would "frustrate the governmental purpose" behind that program (*Camara* v. *Municipal Court, supra,* 387 U.S. at 533).

(e) Finally, insofar as a warrant serves the function of apprising the subject of a search that the officer is acting pursuant to lawful authority (see *id.* at 532), the need for it is reduced in the context of a checkpoint stop. A traveler stopped by a roving patrol on a lonely back road in the early morning hours might well have "no way of knowing the lawful limits of the inspector's power to search, and no way of knowing whether the inspector himself is acting under proper authorization" (*ibid.*). A warrant might serve the meaningful function of evidencing that authority.

A highway checkpoint, however, would not likely raise the same questions in the mind of a traveler, particularly in the border regions involved in this case, where the Border Patrol has been operating such checkpoints since at least 1927 (Pet. App. 14A). Those checkpoints are a familiar sight to persons in that area, and the physical setting of a checkpoint carries its own indicia of lawful authority.

Notice of the checkpoint is usually placed at least one-half mile to the south. The approach is carefully marked with signs and traffic cones and is illuminated with floodlights at night. The checkpoint itself has a

sign directing traffic to stop, and official Border Patrol vehicles are parked on each side of the stop zone. The official Border Patrol emblem and the designation "U.S. OFFICERS" is exhibited. The Border Patrol officers are uniformed.

In these circumstances, a warrant is unnecessary to evidence the authority of the inspecting officers.

II. EVEN IF WARRANTS ARE REQUIRED FOR CHECKPOINT SEARCHES, THE EXCLUSIONARY RULE SHOULD NOT BE APPLIED TO CHECKPOINT SEARCHES THAT WERE CONDUCTED PRIOR TO THE NINTH CIRCUIT'S DECISION IN *UNITED STATES V. BOWEN*

If the Court agrees with our contentions in the first part of the brief and holds that a warrant is not necessary to assure the reasonableness of a Border Patrol checkpoint operation, then it need not reach the issue discussed in this part of the brief—whether a contrary holding would require the suppression of evidence seized in a warrantless search conducted at a time when the law in the Ninth Circuit *permitted* warrantless checkpoint searches. If the Court reaches the issue, we submit that, viewed from the standpoint either of retroactivity doctrine or of exclusionary rule policy, the evidence derived from the stop and search of respondent's vehicle was properly admitted at the trial of this case.[22]

[22] The evidence was the subject of a stipulation (Pet. App. 43A–45A) that stated the nature of the testimony that would have been given by three Border Patrol officers and by the three aliens who were found in respondent's trunk. The court received the testimony pursuant to the stipulation for purposes of both the suppression motion and the trial (*id.* at 47A–48A).

A. THE NINTH CIRCUIT'S DECISION IN *BOWEN* WAS A NEW APPLICATION OF THE FOURTH AMENDMENT'S EXCLUSIONARY RULE; IT SHOULD NOT BE APPLIED RETROACTIVELY TO SEARCHES CONDUCTED BEFORE THE DATE OF THE DECISION IN THAT CASE

In *United States* v. *Bowen, supra,* the Ninth Circuit, sitting *en banc,* ruled for the first time that checkpoint searches conducted without specific probable cause are unlawful in the absence of a warrant. The court believed this result to follow from the decision in *Almeida-Sanchez,* and it also held, applying familiar principles concerning the retroactivity of constitutional rulings, that its application of *Almeida-Sanchez* to checkpoint searches should not be given retroactive effect. It concluded, however, that the cut-off date for retroactivity purposes should not be May 9, 1974, the date of its decision in *Bowen,* but rather June 21, 1973, the date of this Court's decision in *Almeida-Sanchez.*

Since the stop and search of respondent's vehicle in the present case occurred on November 12, 1973 (Pet. App. 44A), the court of appeals panel, applying the *Bowen* decision, held that the evidence derived from the stop and search must be suppressed. We contend that the *Bowen* court's reasoning on the retroactivity issue, with which we agree in nearly all respects, should have resulted in a cut-off date of May 9, 1974, rather than June 21, 1973, and that the new rule for checkpoints should not have been applied to searches, like the one here, that occurred after this Court's decision in *Almeida-Sanchez* but before the Ninth Circuit's decision in *Bowen.*

1. New applications of the evidentiary exclusionary rule, designed to deter future violations of the Fourth Amendment, should not be given retrospective effect

We start with a proposition that we believe is now beyond dispute. Under this Court's prior decisions, a new application of the evidentiary exclusionary rule designed to enforce the Fourth Amendment is to be given prospective effect only. See *Linkletter* v. *Walker*, 381 U.S. 618; *Desist* v. *United States*, 394 U.S. 244; *Williams* v. *United States*, 401 U.S. 646.

That is so because the "prime purpose" of the exclusionary rule "is to deter *future* unlawful police conduct" (*United States* v. *Calandra*, 414 U.S. 338, 347; emphasis added). "We cannot say that this purpose would be advanced by making the rule retrospective. The misconduct of the police * * * has already occurred and will not be corrected by releasing the prisoners involved" (*Linkletter* v. *Walker*, *supra*, 381 U.S. at 637).[23]

[23] We recognize that the retroactivity determination depends not only on the purpose of the new rule but also on the extent to which law enforcement authorities reasonably relied upon the old standards and on the likely impact that retroactive application would have on the administration of justice. *Stovall* v. *Denno*, 388 U.S. 293, 297; *Desist* v. *United States*, *supra*, 394 U.S. at 249. In the context of the Fourth Amendment's exclusionary rule, however, the other factors are of minimal significance, because the rule's "deterrent purpose * * * overwhelmingly supports nonretroactivity" (*id.* at 251).

In any event, both of the other factors also support prospectivity for the ruling in *Bowen*. As we show later in this brief (pp. 49–50), the government reasonably relied on prior law in the Ninth Circuit in conducting checkpoint operations after *Almeida-Sanchez* and before *Bowen*. Applying *Bowen* retroactively, even if only to the date of this Court's decision in *Almeida-Sanchez*, would affect a substantial number of convic-

Thus, while there may be room for disagreement over whether the holding in *Bowen* with respect to checkpoint searches was or was not a new rule in the Ninth Circuit for retroactivity purposes, there can be no serious doubt about the proper consequences of a determination that it was a new rule. It should, in those circumstances, be applied only prospectively to cases in which the challenged search took place after Bowen was decided. *Desist* v. *United States, supra.*

2. The Bowen decision was a new application of the exclusionary rule in the Ninth Circuit and should be applied only prospectively.

The court of appeals in *Bowen* held that "*Almeida-Sanchez* as applied to fixed checkpoints enunciates a new rule of criminal procedure" (500 F. 2d at 980).[24] We agree with the thought but not with the expression. It was not *Almeida-Sanchez* that enunciated the new rule with respect to checkpoints. It was *Bowen* itself.

Whether a decision presents "a choice between prospective or retroactive application of new constitu-

tions based on evidence seized in checkpoint searches conducted before *Bowen* was decided. Many of those cases are pending in the Ninth Circuit on the government's petitions for rehearing, which are being held for the decision in this case. Many cases involving pre-*Almeida-Sanchez* checkpoint searches are before this Court on petitions for writs of certiorari. Those, too, are apparently being held pending the decision in this case and in *Bowen* (No. 73-6848).

[24] In *United States* v. *Peltier*, 500 F. 2d 985, the Ninth Circuit ruled *en banc* that *Almeida-Sanchez* did *not* announce a new rule with respect to roving patrol searches. This Court granted certiorari in that case (No. 73-2000) to consider the correctness of that ruling.

tional doctrine" depends upon whether "it was a clear break with the past" (*Desist* v. *United States, supra,* 394 U.S. at 247, 248). We agree with the court of appeals majority in *Bowen* that, "to constitute a new rule, the decision must either (1) overrule clear past precedent or (2) disrupt a practice long accepted and widely relied upon" (500 F. 2d at 975).[25] *Bowen* did both.

The Border Patrol has operated fixed immigration checkpoints on roads and highways in the Mexican border area since about 1927 (Pet. App. 14A). In 1946, Congress determined that the effective enforcement of the immigration laws required special measures in the border areas. It therefore gave Border Patrol officers the authority within a reasonable distance from the border to conduct limited searches of vehicles for concealed aliens without a warrant and without specific probable cause (60 Stat. 865). Since 1952, that authority has been conferred by Section 287(a)(3) of the Immigration and Nationality Act, 8 U.S.C. 1357(a)(3), and it is implemented by published regulations of the Immigration and Naturalization Service (8 C.F.R. 287.1).

The practice of operating immigration checkpoints and the authority of Border Patrol officers to conduct limited searches of vehicles were first challenged in the Ninth Circuit in 1963. The court of appeals held that the "statute represents congressional recognition of the right of the United States to protect its own

[25] The test is drawn from the dissenting opinion of Mr. Justice Stewart in *Milton* v. *Wainwright*, 407 U.S. 371, 381–382, n. 2.

boundaries against the illegal entry of aliens and is, we think, clearly constitutional" (*Fernandez* v. *United States,* 321 F. 2d 283, 285). It therefore upheld the stop and subsequent search of an automobile at a California checkpoint located 60 to 70 miles from the Mexican border on Highway 101.[26]

The Ninth Circuit thereafter repeatedly upheld against constitutional attack warrantless checkpoint searches of vehicles for aliens. *E.g., Barba-Reyes* v. *United States,* 387 F. 2d 91; *United States* v. *Avey,* 428 F. 2d 1159, certiorari denied, 400 U.S. 903; *Fumagalli* v. *United States,* 429 F. 2d 1011; *Duprez* v. *United States,* 435 F. 2d 1276; *Mienke* v. *United States,* 452 F. 2d 1076; *United States* v. *Foerster,* 455 F. 2d 981, vacated and remanded, 413 U.S. 915; *United States* v. *Aranda,* 457 F. 2d 761.[27]

In these circumstances, the Border Patrol reasonably believed that checkpoint operations in the border areas were constitutionally permissible and validly authorized by statute. As the Ninth Circuit stated in *Bowen,* "[i]f the border patrol agents cannot rely upon a statute supported by clear regulations

[26] The search was conducted after the officers stopped the vehicle, determined that the driver was a Mexican alien, directed him to the side of the road for further questioning, and smelled the odor of marihuana emanating from under the hood of the car (321 F. 2d at 284–285).

[27] The Fifth and Tenth Circuits had also upheld such searches. *E.g., United States* v. *De Leon,* 462 F. 2d 170 (C.A. 5), certiorari denied, 414 U.S. 853; *United States* v. *McDaniel,* 463 F. 2d 129 (C.A. 5), certiorari denied, 413 U.S. 919; *United States* v. *McCormick,* 468 F. 2d 68 (C.A. 10), certiorari denied, 410 U.S. 927; *United States* v. *Anderson,* 468 F. 2d 1280 (C.A. 10).

which have repeatedly been upheld by a Court of Appeals with no Supreme Court disapproval, it is difficult to conceive what degree of official pronouncements would be necessary to make their reliance justified" (500 F. 2d at 979).

That reliance continued to be justified, we submit, even after this Court's decision in *Almeida-Sanchez.* The Court there held that warrantless *roving patrol* searches were unlawful in the absence of probable cause, but the majority did not address the constitutional validity of *checkpoint* searches. Indeed, Mr. Justice White stated in his dissenting opinion that the validity of warrantless checkpoint searches was apparently undisputed (413 U.S. at 288). Mr. Justice Powell, who cast the deciding vote in the case, also clearly stated in his concurring opinion that the checkpoint issue was not involved in that case (413 U.S. at 276).

After studying the opinions in *Almeida-Sanchez,* the Department of Justice concluded, essentially for the reasons we have articulated in the first part of this brief, that the considerations underlying the Court's conclusions with respect to roving patrol searches did not apply with respect to checkpoint searches. Since the law concerning checkpoints in the Ninth Circuit (and in the Fifth and Tenth Circuits) was, in the Department's view, essentially unchanged by *Almeida-Sanchez,* it was determined that it would be proper as a matter of law and prudent as a matter of effective law enforcement to continue operating the checkpoints

in the manner previously approved by the courts of appeals.[28]

Thus, when the Ninth Circuit in *Bowen* overruled its prior decisions upholding warrantless checkpoint searches, it disrupted a law enforcement practice long accepted in that circuit and elsewhere and widely relied upon as a constitutionally permissible technique for detecting and preventing the unlawful transportation of aliens present in this country illegally. We submit, therefore, that *Bowen* constitutes a new rule for purposes of retroactivity.

Even if it could be said—as we have shown it cannot—that *Almeida-Sanchez* foreshadowed *Bowen* and that the government should have been able to predict the outcome in *Bowen* (which was decided by a 7–6 vote), this Court's decision in *Desist* v. *United States, supra*, makes clear that even a foreshadowed and predictable decision may be viewed as establishing a new rule for purposes of retroactivity if it in fact overrules past precedent.[29]

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[28] As we noted above (pp. 40–41 and n. 29, *supra*), there is substantial confusion over whether checkpoint warrants may properly be issued.

[29] In *Desist*, this Court refused to give retroactive effect to *Katz* v. *United States*, 389 U.S. 347, which for the first time expressly abandoned the Fourth Amendment "trespass' doctrine of *Olmstead* v. *United States*, 277 U.S. 438. Even prior to *Katz*, however, the Court had already "departed from the narrow view on which [*Olmstead*] rested" (389 U.S. at 353). Indeed, "the underpinnings of *Olmstead* * * * [had] been so eroded by our subsequent decisions that the 'trespass' doctrine there enunciated [could] no longer be regarded as controlling" (*ibid.*). Mr. Justice Fortas thus stated in his dissenting opinion in *Desist* that "*Katz* did no more than administer the *coup de grace* to [*Olmstead's*] moribund doctrine" (394 U.S. at 273). The ruling in *Katz*, he said, was "neither novel

Bowen did not, of course, overrule any prior decision of the Supreme Court. The validity of warrantless checkpoint searches is presented to this Court for the first time in this case. *Bowen* did, however, overrule past precedent in the Ninth Circuit, and it disrupted a law enforcement practice conducted in reasonable reliance upon that past precedent. All the purposes served by giving only prospective effect to decisions of this Court overruling its own prior cases in the Fourth Amendment area are fully applicable when a court of appeals overrules *its* own prior cases in that area.

Respondent argued in his Memorandum in Opposition that the Ninth Circuit's repeated approval of warrantless checkpoint searches was merely an unjustified departure from "the well-established doctrine first enunciated by this Court in *Carroll* v. *United States*" and that the Ninth Circuit's "return to [that doctrine] on 9 May 1974 in *Bowen* raises no retroactivity issue" (p. 5). But that is an argument from hindsight. Even if, contrary to our argument in the first part of this brief, the Ninth Circuit correctly concluded on a vote of 7–6 that warrantless checkpoint searches are unlawful, it surely cannot be argued that the government should have recognized all along that the Ninth Circuit's consistent approval of checkpoint searches was aberrational and incorrect.

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nor unanticipated" (*id.* at 271); it was fully predictable from "the plain purport of our decisions" (*id.* at 277).

The Court nevertheless held that *Katz*, by expressly overruling *Olmstead*, established a new rule for purposes of retroactivity. "However clearly our holding in *Katz* may have been foreshadowed, it was a clear break with the past, and we are thus compelled to decide whether its application should be limited to the future" (*id.* at 248).

To say that *Bowen* raises no retroactivity issue is to suggest that a decade of repeated judicial approval of a law enforcement practice by a federal court of appeals may not reasonably be relied upon by the government in the exercise of its law enforcement responsibilities. But "statutory or even judge-made rules of law are hard facts on which people must rely in making decisions and in shaping their conduct" (*Lemon* v. *Kurtzman,* 411 U.S. 192, 199 (opinion of Chief Justice Burger)). Applying the exclusionary rule with respect to checkpoint searches conducted prior to *Bowen* would not further the deterrent purpose of the rule. It would merely punish the government and the public for "the reliance * * * placed, in good faith, on prior law" (*Wolff* v. *McDonnell,* No. 73–679, decided June 26, 1974, slip op. 32).

Judge Hufstedler's dissenting opinion in *Bowen* cited this Court's decision in *Robinson* v. *Neil,* 409 U.S. 505, for the proposition that "the only 'old' and 'new' law that is relevant [for retroactivity purposes] is the constitutional law enunciated by the Supreme Court" (500 F. 2d at 984). *Robinson* gave retroactive effect to *Waller* v. *Florida,* 397 U.S. 387, which barred on double jeopardy grounds successive municipal and state prosecutions for the same or a greater offense. The issue in *Robinson,* however, was not whether *Waller* was or was not a new rule but whether, *as* a new rule, it should or should not be applied retroactively. The Court stated that traditional retroactivity analysis was not suited to the problem because the *Waller* ruling was directed, not "to collateral purposes such as the deterrence of unlawful

police conduct," nor even to considerations of basic trial fairness, but rather "to the prevention of the second trial's taking place at all" (409 U.S. at 509). In weighing the competing considerations with respect to a retroactivity ruling that would affect all second convictions, the Court recognized that the State might have relied upon the discarded "dual sovereignty" analogy in permitting the municipal prosecution to occur first.

The Court concluded, however, that the State's reliance did not warrant substantial weight. Since the Supreme Court had not earlier considered the question, "*Waller* cannot be said to have marked a departure from past decisions of this Court," and "the State's reliance on lower court decisions supporting the dual sovereignty analogy was a good deal more dubious than the justification for reliance that has been given weight in our *Linkletter* line of cases" (*id.* at 510).

Robinson is not a holding that only a departure from Supreme Court decisions can raise a retroactivity issue. It is a holding that reliance upon lower court decisions in the context of an application of double jeopardy principles may not be entitled to as much weight in the retroactivity calculus as would reasonable reliance upon prior Supreme Court decisions.

The Court has made it plain in other contexts that a question of retroactivity may be raised if a Supreme Court decision overturns a line of lower court authority, even though it does not depart from prior Supreme Court decisions. In *Chevron Oil Co.* v. *Huson,* 404 U.S. 97, for example, this Court declined to give retroactive application to *Rodrigue* v. *Aetna Casualty &*

Surety Co., 395 U.S. 352, where the result would have been to interpose an unanticipated time bar to a personal injury action. The Court reasoned that "*Rodrigue* was not only a case of first impression in this Court * * *, but it also effectively overruled a long line of decisions by the Court of Appeals for the Fifth Circuit" (404 U.S. at 107). When the injury occurred and the action was filed, "these Court of Appeals decisions represented the law governing [the plaintiff's] case" (*ibid.*). He was justified in "rely[ing] on the law as it then was" (*ibid.*). See also *Adams* v. *Illinois*, 405 U.S. 278; *Gosa* v. *Mayden*, 413 U.S. 665.

It is also settled that a court of appeals may determine that one of its own decisions should be given only prospective application. See, *e.g.*, *United States* v. *Gillum*, 463 F. 2d 957 (C.A.D.C.); *United States* v. *Haywood*, 452 F. 2d 1330, 1332 (C.A.D.C.); *Gaither* v. *United States*, 413 F. 2d 1061, 1081–1085 (C.A.D.C.); *United States ex rel. Williams* v. *Twomey*, 467 F. 2d 1248, 1252–1253 (C.A. 7); *United States ex rel. Mayfield* v. *Pate*, 451 F. 2d 1381, 1382–1384 (C.A. 7); *Castro* v. *United States*, 396 F. 2d 345, 349–350 (C.A. 9); *Lamb* v. *Brown*, 456 F. 2d 18, 20 (C.A. 10).

There is, in sum, no reason to think that the rationale of this Court's retroactivity decisions is limited to situations in which this Court has overruled or departed from its own prior decisions. When a court of appeals overrules a long line of its prior cases and applies the evidentiary exclusionary rule with respect to a class of searches that had previously been held valid, it should apply its new rule prospectively or retrospectively in accordance with the principles that have been enunciated in this Court's retroactivity decisions.

While this may lead to different cut-off dates in the various circuits for the application of a new rule, there is nothing anomalous about that result. It simply reflects the fact that what may be reasonable law enforcement conduct in reliance upon the law of one circuit may not be reasonable in a circuit that has held the same conduct to be unlawful.[30] The prospect of a slight lack of symmetry among the courts of appeals is of negligible weight when balanced against the substantial interests of the criminal justice system served by a sensible and pragmatic application of this Court's settled retroactivity principles.[31]

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[30] In her dissenting opinion in *Bowen*, Judge Hufstedler stated that the court's decision in that case should be made *fully* retroactive, because even applying it prospectively from the date of *Almeida-Sanchez* would have "disturbing consequences" (500 F. 2d at 985). Among the "disturbing consequences" she envisioned were different cut-off dates for retroactivity among the various circuits, a result that she thought "would impair or destroy the uniform application of constitutional law" and "turn confusion into chaos" (*id.* at 984, 985). In our view, however, the problem is illusory. There is no need for the exclusionary rule to be applied on a rigidly uniform basis where the circumstances within the several circuits may be substantially different. The focus of the exclusionary rule is upon the deterrent and curative effect it is thought to have on police conduct. Some concededly guilty defendants are the windfall beneficiaries of that deterrent rule, but it is not unfair to a defendant to permit probative evidence to be admitted against him simply because he might have received a windfall benefit had the search taken place at the same time in a different circuit. It would be a far more disturbing consequence, we submit, if a guilty defendant were set free because evidence seized from him by an officer acting in good faith reliance on prior law were excluded at trial even though no deterrent purpose would thereby be served.

[31] There may, of course, be circumstances, not present here, in which a court of appeals decision overruling prior law in the circuit was so clearly foreshadowed by a Supreme Court decision

B. REGARDLESS OF WHETHER *BOWEN* ANNOUNCED A NEW RULE FOR RETROACTIVITY PURPOSES, THE POLICY OF THE EXCLUSIONARY RULE DOES NOT SUPPORT ITS APPLICATION WITH RESPECT TO WARRANTLESS CHECKPOINT SEARCHES CONDUCTED IN THE NINTH CIRCUIT PRIOR TO THAT DECISION

Whether or not *Bowen* can properly be viewed as a sufficient change in the law to present a choice between prospectivity and retroactivity, the policy underlying the evidentiary exclusionary rule would not be ad-

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that the government's continued reliance on the prior law of the circuit might not be reasonable. In that situation, the proper cut-off date might be the date of the Supreme Court's decision. There might also be circumstances in which a court of appeals decision overruling prior cases appears to depart from existing Supreme Court law as well. In that situation, the government might reasonably continue a law enforcement practice even after the court of appeals decision, in reliance upon the Supreme Court's decisions.

That question need not be decided here, however, because the search in this case took place *before* the Ninth Circuit's decision in *Bowen*. There is consequently no need for the Court to consider whether the exclusionary rule should be applied to a post-*Bowen* warrantless checkpoint search. Nor is the issue likely to arise. As we indicated earlier (note 20, *supra*), the Border Patrol modified its checkpoint practices in the Ninth Circuit after the *Bowen* decision. Vehicles were stopped for routine inquiries concerning the citizenship of the occupants, but searches were conducted only upon probable cause or with consent. After the Ninth Circuit held in *United States* v. *Brignoni-Ponce*, 499 F. 2d 1109, certiorari granted, October 15, 1974, No. 74–114, and *United States* v. *Esquer-Rivera*, No. 74–1110, decided July 1, 1974, that routine roving patrol or checkpoint stops without warrants or particularized founded suspicion are unlawful, the Border Patrol began seeking warrants to permit such stops at the checkpoints. Since then, none of the checkpoints in the Ninth Circuit has been operated without a warrant authorizing routine stops for inquiry. The situation has not been wholly satisfactory. We are informed by the Immigration and Naturalization Service that several of the checkpoints have not been operated at all because of an inability to secure warrants for them and that the deterrent effectiveness of the checkpoint system as a whole has been diminished.

vanced by imposing that sanction with respect to official investigative activities undertaken in complete good faith, in reasonable reliance upon apparent statutory authority, and consistent with repeated judicial approval. As this Court observed in *Michigan* v. *Tucker,* No. 73–482, decided June 10, 1974, slip op. 13:

> The deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in willful, or at the very least, negligent conduct which has deprived the defendant of some right. By refusing to admit evidence gained as a result of such conduct, the courts hope to instil in those particular investigating officers, or in their future counterparts, a greater degree of care towards the right of an accused. Where the official action was pursued in complete good faith, however, the deterrence rationale loses much of its force.

These observations apply with full force to the actions of the Border Patrol in conducting checkpoint searches in the Ninth Circuit prior to that court's decision in *Bowen.* Whatever may be the correct resolution of the retroactivity question, it can hardly be doubted that the Border Patrol's checkpoint activities prior to *Bowen* were carried out in good faith pursuant to a considered and reasonable determination that checkpoint searches for aliens could validly be conducted without a warrant under the existing law of the Ninth Circuit. In these circumstances, no substantial deterrent purpose would be served by requiring the exclusion of highly probative evidence derived from such searches prior to the time that the law in that circuit was changed by *Bowen.*

Thus, as a matter either of retroactivity doctrine or of exclusionary rule policy—both of which are governed by substantially similar considerations—evidence procured in a warrantless checkpoint search should not be suppressed if the search was conducted prior to the date of the first controlling judicial determination that such searches in the absence of a warrant are unlawful. The first controlling judicial determination in the Ninth Circuit was the decision in *Bowen*.

CONCLUSION

The judgment of the court of appeals should be reversed and the case should be remanded with directions to reinstate the judgment of the district court.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.
HENRY E. PETERSEN,
Assistant Attorney General.
MARK L. EVANS,
Assistant to the Solicitor General.
SIDNEY M. GLAZER,
ROBERT H. PLAXICO,
Attorneys.

DECEMBER 1974.

APPENDIX

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

IN THE MATTER OF CERTAIN CRIMINAL CASES	ORDER GENERAL ORDER No. 176

Presently there are a large number of criminal cases now pending before this court which involve the question of the impact of the recent Supreme Court decision in Almeida-Sanchez v. United States, 93 S.Ct. 2535 (1973). In accord with this court's policy of expediting and giving priority to criminal cases and with the intent of applying the applicable principles of law in this area on a uniform basis, this court, by vote of all judges present in the district on October 9, 1973, has decided to expedite and consolidate these cases where appropriate.

THEREFORE, IT IS HEREBY ORDERED that the United States Attorney review all cases now pending before this court and make appropriate motions to consolidate those cases which he believes should properly be considered together. The United States Attorney is to consult the clerk of the court and together they are to draw up a proposed calendar consolidating appropriate cases. This calendar should be scheduled before the chief judge for his consideration or reassignment.

By way of guidance, the court would suggest that searches conducted at checkpoints operated by the U. S. Border Patrol may be consolidated together in groups according to the individual checkpoints involved.

It is the intention of this court that this consolidation will facilitate the presentation, by all interested parties, of any pertinent information which might aid the court in its eventual determination. It is anticipated that the parties concerned will make an effort to draw up stipulations concerning relevant facts (i.e., geographical descriptions, statistical data, etc.) so as to narrow any questions of fact to be litigated to the minimum.

IT IS FURTHER ORDERED that a copy of this order be publicly displayed with notice to all attorneys

currently on the appointed list for this district so that any defendant who believes that his case should be considered on a consolidated basis because of a factual situation which is not unique, can make an appropriate motion for transfer to the consolidated calendar.

This order is effective the date hereof.

DATED: October 17, 1973

HOWARD B. TURRENTINE, Judge
United States District Court

GORDON THOMPSON, JR., Judge
United States District Court

DELAND C. NIELSEN, Judge
United States District Court

WILLIAM B. ENRIGHT, Judge
United States District Court

*Judge Edward J. Schwartz was not present in the district on October 9, 1973.

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IN THE

Supreme Court of the United States

OCTOBER TERM 1974

No. 73-2050

UNITED STATES,

Petitioner,

v.

LUIS ANTONIO ORTIZ,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENT

JOHN J. CLEARY
CHARLES M. SEVILLA
FRANK J. RAGEN
Federal Defenders of San Diego, Inc.
925 First Avenue, Suite 260
San Diego, California 92101
(714) 234-8467

Attorneys for Respondent

Washington, D.C. • CLB PUBLISHERS' • LAW PRINTING CO. • (202) 393-0625

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IN THE

Supreme Court of the United States

OCTOBER TERM 1974

No. 73-2050

UNITED STATES,

Petitioner,

v.

LUIS ANTONIO ORTIZ,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENT

QUESTIONS PRESENTED

I. Whether this Court's decisions in *Carroll v. United States*, 267 U.S. 132 (1925) and *Almeida-Sanchez v. United States*, 413 U.S. 266 (1973)–which held that traditional notions of probable cause applied to warrantless, causeless searches of automobiles–apply to warrantless, causeless Border Patrol searches of automobiles at the fixed checkpoint at San Clemente, California.

II. Whether the requirement for either probable cause or a warrant to stop and search a vehicle for aliens at a checkpoint existed *after* the decision in *Almeida-Sanchez* (21 June 1973).

STATEMENT OF THE CASE

With the petitioner's statement of facts as it relates to the trial based upon stipulated facts in this case, respondent has no quarrel. (Brief for Pet. 4) However, with respect to petitioner's assertion that the opinion in *United States v. Baca, et al.*, 368 F.Supp. 398 (S.D. Cal. 1973) [hereinafter cited as *Baca*] is part of the record in this case, respondent disagrees. As reflected in respondent's response to the petitioner's motion to dispense with the requirement of an appendix, trial counsel for the respondent reiterated his motion to suppress evidence based on *Almeida-Sanchez v. United States*, 413 U.S. 266 (1973). The trial court, Judge Schwartz, responded:

> "Well, the motion, I think has been ruled on. Judge Turrentine is filing an opinion this morning. Now, I don't know as of yet how this would be affected, because I haven't had an opportunity to read the opinion. A copy of it has been just supplied to me, and I suppose I can take a look at it and see if there is anything—although it's rather lengthy, that might affect this, but I don't think so. *I think I'm simply going to make the ruling on my own in this particular case with regard to*

Almeida-Sanchez question and the validity of the San Clemente checkpoint." (Tr. 4-5)[1] [Emphasis added]

Thus, while the trial court had the opportunity to incorporate Judge Turrentine's opinion as its own, it chose not to do so. Clearly, the trial court had the opportunity to read Judge Turrentine's opinion and either accept its holdings and incorporate it as part of respondent's case, or reject it. The petitioner suggests that because the trial court chose to do neither by ignoring Judge Turrentine's opinion and making its own decision "in this particular case," that the consolidated hearings automatically became part of respondent's record. Respondent submits that the purpose behind the consolidated hearings was to give one trial court the opportunity to review the constitutionality of the checkpoints in the Southern District of California after an evidentiary hearing. By referring cases to Judge Turrentine, the other four judges in the Southern District of California did not stipulate that they would be bound by whatever result Judge Turrentine reached. Indeed, that is why "Judge Turrentine did not, . . . specifically rule on the individual validity of any of the searches that occured in the sixteen cases that were consolidated for the evidentiary hearing. That determination was left to the judge principally assigned to each case." (Brief for Pet. 7-8) Thus, when the case was referred back to Chief Judge Schwartz, the latter elected not to refer to Judge Turrentine's opinion. Rather, the trial court decided to rule on respondent's

[1] Tr. shall refer to the transcript of matters before Judge Schwartz. B.Tr. shall refer to the hearing in *United States v. Baca, et al.*

motion to suppress "on my own in this particular case with regard to *Almeida-Sanchez* question and the validity of the San Clemente checkpoint." (Tr. 4-5) This conclusion is buttressed by the fact that respondent did not attend the *Baca* hearings and did not waive his right to be personally present. Although represented by counsel during the consolidated motion hearings (B.Tr. 9), the respondent himself was not present, nor was there a waiver of his presence filed for those hearings. A defendant charged with a felony has a constitutional right to be personally present in the courtroom at every stage of his trial, unless he shall forfeit that right by conduct that is so disorderly and disruptive that his trial cannot be carried on with him in the courtroom. *Illinois v. Allen*, 397 U.S. 337 (1970). Certainly if the *Baca* opinion is to be deemed part of respondent's trial record, the district court's hearing of the motion to suppress in respondent's absence was without legal justification. Fundamental constitutional rights, such as the right to be present at a motion to suppress hearing, do not yield to calendar convenience. *See* Rule 43, *Federal Rules of Criminal Procedure*.

Technically, the case did include the actual record of the *Baca* hearings because the General Order (Brief for Pet. 59-60) did refer the *Ortiz* case for a consolidated evidentiary hearing. The government is in a better position to assert that the transcript of the hearing and exhibits introduced are before this Court, but the conclusion (opinion) of Judge Turrentine is not. Although the respondent will of necessity make reference to the testimony and exhibits of the *Baca* hearing, the respondent does not waive the procedural

and substantive errors and limitations of that hearing. In light of the foregoing, petitioner's attempt to bootstrap the *Baca* opinion onto this case is inappropriate and should not receive the sanction of this Court. For purposes of resolution of this question, respondent did not oppose the inclusion of the transcripts and exhibits of the *Baca* hearing which are the best evidence of the shortcomings of the district court opinion.

SUMMARY OF ARGUMENT

Each year some ten million American motorists traverse north on Interstate Highway 5 toward Los Angeles, California. Their journey is interrupted by a permanent Border Patrol checkpoint located near San Clemente, California, some 66 miles north of the Mexican-American border. As each motorist reaches the checkpoint, at least one Border Patrol officer is standing in the middle of the highway halting all traffic. The officer visually inspects the occupants of the vehicle and makes a subjective determination, guided by no statutory or administrative regulation, to refer vehicles off the road for further interrogation. Once referred off the highway, the occupants of the vehicle are subjected to interrogation concerning their citizenship and right to be in the United States by armed, uniformed officers. If the officers so elect, the driver may be ordered to open the trunk and hood of his vehicle. At no time prior to any of this activity do the officers have a reasonable suspicion directed at the occupants of the vehicle that they may be violating immigration laws. Because the Border Patrol is looking

for illegal Mexican alien entrants, the occupants of the vehicle are usually referred off the highway because of apparent Latin-American appearances. In Southern California, there are hundreds of thousands of citizens and lawful residents of Latin-American appearance.

When this Court declared roving warrantless, causeless stops and searches conducted by the Border Patrol unconstitutional in *Almeida-Sanchez v. United States*, 413 U.S. 266 (1973), the authority for the above-described warrantless, causeless stop and search activity at Border Patrol checkpoints vanished. The three circuit courts of appeal which have ruled on warrantless, causeless searches conducted at checkpoints not the functional equivalent of the border agree that *Almeida-Sanchez* invalidates such searches. The Fifth, Ninth, and Tenth Circuits have held that a necessary antecedent to a lawful automobile stop and search at an immigration checkpoint is probable cause. The principle of probable cause to search is not the invention of intervening courts or a new concept; it is a constitutional mandate of the Fourth Amendment and applied to vehicles by this Court for at least fifty years. *Carroll v. United States*, 267 U.S. 132 (1925).

I.

In seeking a constitutional theory to support the warrantless, causeless stops and searches at the San Clemente checkpoint, the petitioner retreats to the authority of administrative inspection cases such as *Camara v. Municipal Court*, 387 U.S. 523 (1967). Administrative inspection cases are inapposite here since

the operation of the San Clemente checkpoint involves criminal investigations in which armed law enforcement officers conduct stops and searches and arrest all persons found violating the immigration statutes. Whether or not prosecution is subsequently authorized is a matter largely dependent upon the press of caseloads, the availability of jail space, and prosecutorial discretion.

The operation of inland permanent checkpoints is but one of numerous Border Patrol operations to deter aliens from illegally entering the United States. The inland checkpoints have taken away from the border personnel needed to protect against illegal entry at the first opportunity; in fact, there are almost twice as many officers assigned to the San Clemente checkpoint as are assigned to the entire Mexico-California border. Nevertheless, the checkpoints account for only 8% of the total deportable aliens apprehended in the United States and are ineffective in either deterring or apprehending aliens. The San Clemente checkpoint, for instance, apprehends only about 5% of the illegal alien traffic going through it. In one twenty-day working period, Immigration and Naturalization Service (INS) officers apprehended more deportable aliens in Los Angeles than were apprehended in an entire year at the San Clemente checkpoint. *Hearings, infra* note 24 at 30.

In addition to the numerous alternative programs the INS has to deter and apprehend deportable aliens, it is with Congress that the most meaningful deterrent may be found. Legislation to make the knowing employment of a deportable alien illegal is the only effective way of deterring the entry of poor aliens who come to the United States in search of work.

II.

The petitioner asserts the San Clemente checkpoint operation is constitutional because there exists a "functional equivalent of probable cause" to believe immigration violations are taking place in that area. If this concept of probable cause is to be truly "functional" and "equivalent," then a significant number of the cars traversing through the checkpoint should contain immigration law violaters. However, statistical samples indicate that less than one tenth of one per cent of the people in automobiles passing through the checkpoint are deportable aliens. The petitioner asserts that the determination of the functional equivalent of probable cause and thus the location of a checkpoint is one that Border Patrol officers may make while safeguarding the Fourth Amendment rights of the public. Respondent submits that if the functional equivalency doctrine has validity, the determination of probable cause based on equivalency criteria is one only a judicial officer may make. Given the focus on aliens illegally entering from Mexico, it is no secret that Border Patrol officers are stopping cars, interrogating occupants, and searching vehicles driven by persons of Latin-American appearance in order to locate the deportable Mexican aliens. These decisions are currently being made at the whim of the officers manning the checkpoints. Respondent submits that unless there is probable cause to believe immigration violators are within a vehicle under traditional standards, that the protection of a warrant is necessary prior to the operation of a checkpoint. Such warrants are currently being issued in the judicial districts in the southwestern United States.

III.

The contention of the petitioner that *Almeida-Sanchez* should not be applied to stops and searches conducted at checkpoints prior to 9 May 1974, the date of the opinion in *United States v. Bowen*, 500 F.2d 985 (9th Cir. *en banc* 1974) is untenable. As the *Bowen* court stated, when this Court held that the statute and regulation concerning Border Patrol stop and search powers were not exempt from traditional Fourth Amendment scrutiny, "the government's statutory justification for fixed checkpoint searches as well as for roving patrol searches vanished." (*Id.* at 988) *Bowen* overturned no Ninth Circuit precedent; *Almeida-Sanchez* did. *Almeida-Sanchez* clearly foreshadowed the Ninth Circuit decision in *Bowen*.

In *Bowen* the Ninth Circuit took the position that its prior decisions required that *Almeida-Sanchez* be given a limited prospective application, i.e., only to those searches which occurred after 21 June 1973, the date of the *Almeida-Sanchez* opinion. Although respondent disagrees with this view of the Ninth Circuit in refusing to hold the probable cause requirement applicable to all checkpoint searches, this is not an issue here where the search occurred after the decision in *Almeida-Sanchez*. The application given *Almeida-Sanchez* in this case is correct and the decision of the Ninth Circuit must be affirmed.

ARGUMENT

I.

AN IMMIGRATION SEARCH FOR ALIENS, WHETHER CONDUCTED PURSUANT TO A ROVING, TEMPORARY, OR PERMANENT CHECK, MUST BE SUPPORTED BY PROBABLE CAUSE AS DEFINED IN *ALMEIDA-SANCHEZ V. UNITED STATES*, 413 U.S. 266 (1973).

The judgment of the three courts of appeal whose daily concern is the enforcement of the immigration laws along the Mexican-American border, and who, perhaps have the best vantage point to judge the practicalities of border area law enforcement and the reasonableness of official searches of vehicles to enforce immigration statutes, is that warrantless searches conducted without probable cause at permanent checkpoints are invalid under *Almeida-Sanchez v. United States*, 413 U.S. 266 (1973). *United States v. Bowen*, 500 F.2d 960 (9th Cir. *en banc* 1974); *United States v. Speed*, 497 F.2d 546 (5th Cir. 1974); *United States v. King*, 485 F.2d 353 (10th Cir. 1973); *United States v. Maddox*, 485 F.2d 361 (10th Cir. 1973).[2]

[2] The Tenth Circuit cases of *Maddox* and *King* were remanded to the trial courts with instructions to grant the motions to suppress unless the checkpoints were found to be at the functional equivalents of the border. See *Almeida-Sanchez, supra* at 275. Since the government concedes that the checkpoint involved in this case is not at the functional equivalent of the border, no further discussion of this concept is necessary. *See* Brief for Pet. 16.

The San Clemente checkpoint is a permanent roadblock of all traffic proceeding north between California's two largest cities, San Diego and Los Angeles, and is situated 66 miles north of the Mexican-American border. The operation of the checkpoint is totally unregulated in that Border Patrol officers at the checkpoint have complete and unfettered discretion to stop and refer any vehicle off the highway for interrogation and search purposes. The checkpoint is manned by a uniformed, fully-armed, Border Patrol law enforcement officer standing in the middle of the highway. As the decelerating oncoming vehicles approach this officer's position, the latter visually determines whether or not he desires to refer the car to the secondary position off the highway for interrogation and search.[3]

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[3] It is quite clear that all traffic is initially stopped on the highway at the San Clemente checkpoint for the initial visual examination by the point officer and, if traffic is light, questioning. If the officer believes the car should be further examined based upon his own subjective evaluation, he may refer it off the highway for a search. In *United States v. Baca*, 368 F.Supp. 398, 415 (S.D. Cal. 1973), the District Court judge found that at the San Clemente checkpoint the average motorist is stopped although it may be "nothing more than a fleeting stop;...." (*Id.* at 415) The brief of the petitioner does not recognize the initial stop that takes place in the middle of the highway to allow the point officer this opportunity to visually examine the occupants and interior of the approaching vehicles. To avoid semantic disagreements, respondent will refer in this brief to this initial stop as being the point stop and the direction off the highway for further interrogation and search as the secondary stop. This characterization comports with Border Patrol practice and terminology.

In *Almeida-Sanchez*, the only asserted justification for the Border Patrol's alleged right to stop and search every car within 100 miles of the border area was § 287(a) of the Immigration and Nationality Act, 8 U.S.C. § 1357(a) and its accompanying regulations, 8 CFR § 287.1. This Court held that such an extravagant license to search was not granted by the statute and regulation. The license sought to justify the procedure at the San Clemente checkpoint is even more extravagant than that requested and rejected in *Almeida-Sanchez*. While roving patrols involved a single officer stopping a single vehicle in isolated, rural areas near the border, the government seeks an open-ended license to stop and search all traffic between two of the largest cities in the United States at a point 66 miles north of the international border. For the reasons expressed below, this application to deconstitutionalize vast swaths of land area well within the borders of the United States must be firmly rejected.

A. There are no facts of constitutional significance which distinguish causeless automobile searches conducted as a result of roving, temporary, or fixed Border Patrol checks.

The only difference between the stop and search in this case and that which was the subject of review in *Almeida-Sanchez* is that respondent's stop occurred at a fixed checkpoint rather than by a roving immigration stop. Unlike Conrado Almeida-Sanchez who was "redlighted" to the side of the road by a Border Patrolman in a marked vehicle 25 miles from the border, the respondent was initially stopped by a

uniformed, armed Border Patrolman standing in the middle of Interstate 5 some 66 miles north of the Mexican-American border. The officer ordered respondent to drive off the freeway to a secondary position for further interrogation and a search of his vehicle. Thus, the difference between the stops and searches in both cases is that respondent's occurred at a permanently-located roadblock while Conrado Almeida-Sanchez was stopped by a roving vehicle. The difference of the intrusion to the victim is insignificant; this Court has never held a stop and search at a roadblock to be less intrusive than a stop and search resulting from a roving patrol vehicle.

Although the intrusion to the victim is the same at roving, temporary, and permanent checkpoints, the latter two operations do differ from the roving procedure in that more of the traveling public are forced to place their liberties in the hands of the officers at checkpoints. Roving checkpoint operations located in remote areas close to the border involved less Border Patrol-citizen contacts; the San Clemente checkpoint operation alone involves a massive, permanent roadblock of thousands of vehicles each day well away from the border. The yearly traffic flowing north and stopped at this roadblock is in excess of ten million vehicles per year.[4]

[4] Brief for Pet. 41, n. 21 makes a reference to *United States v. Martinez-Fuerte*, No. 74-2462, currently before the Ninth Circuit. *Martinez-Fuerte* involves a warrant issued to authorize operation of the San Clemente checkpoint. The affidavit submitted by Assistant Chief Patrol Agent for the Chula Vista Sector, Robert D. McCord, to obtain the warrant indicates the average hourly traffic passing through the checkpoint to be 1200 vehicles. Multiplying this hourly rate times the hours in one year reveals that 10,512,000 cars pass the checkpoint annually. The warrant in *Martinez-Fuerte* is included as Appendix A to this Brief.

For constitutional purposes, this examination of the similarities in respondent's stop and search and that of Conrado Almeida-Sanchez is decisive. In both cases, the Border Patrol agents had no search warrant, no probable cause before the stop or subsequent search, nor was there even the "reasonable suspicion" found sufficient for a street detention and weapon search in *Terry v. Ohio*, 392 U.S. 1 (1968) and *Adams v. Williams*, 407 U.S. 143 (1972). The officers did not have reason to believe that respondent had crossed the border or had been in contact with anyone that had. Just as with the case involving Almeida-Sanchez, the stop and search "in the present case was conducted in the unfettered discretion of the members of the Border Patrol, who did not have a warrant, probable cause, or consent." *Almeida-Sanchez, supra* at 271. This permanent roadblock offers the Border Patrol just the "field day" in searching automobiles which the Border Patrol was declared not to have in *Almeida-Sanchez, supra*, at 269. As in *Almeida-Sanchez*, the government can point to no regulations of any judicial or administrative authority which circumscribe the discretion of the Border Patrolmen at the checkpoint in determining whom they shall subject to the more intrusive interrogation and search after the initial primary stop. Moreover, because over a thousand cars per hour are stopped at primary for the initial inspection, the permanent roadblock at San Clemente offers more opportunities for the exercise of the Border Patrolman's unfettered discretion than occur in roving stops by individual officers in rural areas near the border.

Petitioner argues that the safety features at permanent checkpoints involving lighting and warning signs somehow make the subsequent intrusion on the traveling public less traumatic, thus magically metamorphosizing unconstitutional activity into legal action. Respondent submits that safety and civility are norms expected of governmental officers in conducting stops, interrogations, and searches of vehicles. No court has ever held that warrantless, causeless stops and searches by law enforcement officers attain legal status solely because they are conducted in a safe and humane manner. Courtesy does not eradicate a violation of the Fourth Amendment.

The probable cause requirement for a stop and search of an automobile is not a new principle. The language quoted in *Almeida-Sanchez* from Chief Justice Taft's opinion in *Carroll v. United States*, 267 U.S. 132 (1925) is directly on point here. Speaking in an era when the automobile had not yet become the commonly recognized transportation conveyance, the Court recognized the indignity and inconvenience of a stop and search. Today the automobile is available to all and necessary to most persons; thus, Chief Justice Taft's language has even greater force:

> "It would be intolerable and unreasonable if a prohibition agent were authorized to stop every automobile on the chance of finding liquor, and thus subject all persons lawfully using the highways to the inconvenience and indignity of such a search. Travelers may be so stopped in crossing an international boundary because of national self-protection reasonably requiring one entering the country to identify himself as entitled to come in, and his belongings as effects which

may be lawfully brought in. But those lawfully within the country, entitled to use the public highways, have a right to free passage without interruption or search unless there is known to a competent official authorized to search, probable cause for believing that their vehicles are carrying contraband or illegal merchandise." (*Id.* at 154)

B. Causeless stops and searches conducted by means of roving, temporary or fixed checks cannot be supported by analogy to administrative inspections.

The government returns to the administrative inspection rationale rejected by this Court in *Almeida-Sanchez* in order to justify its causeless stop and search operations at checkpoints. Again:

> "In seeking a rationale for the validity of the search in this case, the government . . . relies heavily on cases dealing with administrative inspections. But these cases fail to support the constitutionality of this search." *Almeida-Sanchez, supra* at 270.

As in *Almeida-Sanchez*, the government points to no previous decision of this Court involving the causeless search of an automobile for authorization of causeless stops and searches at the San Clemente roadblock. Despite the clear language by this Court ("Automobile or no automobile, there must be probable cause for the search." *Almeida-Sanchez, supra* at 269), the government returns to the administrative inspection cases for support.

1. Administrative inspection cases, involving businesses closely regulated and licensed by the government, are inapposite to Border Patrol searches for illegal aliens.

Administrative inspections of commercial enterprises authorized by statutes have met with the approval of this Court when the businesses have long histories of close regulation and licensing by the government. *United States v. Biswell*, 406 U.S. 311 (1972) [firearms]; *Colonnade Catering Corp. v. United States*, 397 U.S. 72 (1970) [liquor].

The rationale of the Court in upholding statutorily authorized administrative inspections is that one engaged in federally licensed and regulated enterprises accepts the burdens as well as the benefits of the trade. In this case, the respondent was engaged in no heavily-regulated or licensed enterprise. He was merely exercising his constitutional right to travel free from baseless governmental intrusion while within the United States. *Shapiro v. Thompson*, 394 U.S. 618 (1969); *Edwards v. California*, 314 U.S. 160 (1941); *Williams v. Fears*, 179 U.S. 270, 274 (1900); *Crandall v. Nevada*, 73 U.S. (6 Wall.) 35, 49 (1867).

An important distinguishing characteristic of the administrative inspections of regulated businesses is that such inspections are made pursuant to detailed legislative guidelines, statutes, or ordinances, which carefully circumscribe the discretion of the inspecting official. The authorizing statute, much like a search warrant, contains standards limiting the time, place, and scope of the inspections. Here, there is no authorizing statute or administrative regulation which in any way limits the time, place, scope or subjects of alien searches. That decision is left to the unbridled

discretion of the point officer standing in the middle of the highway. Further, the scheme of the regulation in the administrative context is sufficiently pervasive that those subject to inspection have been put on notice by their own familiarity with the statutes and the frequent visits of the inspectors. In addition, inspecting officials know with certainty that the premises to be inspected are in fact within the scope of their authority. However, the traveling public does not have notice of the requirement of searches at checkpoints (B. Tr. 281), nor do the officers know if the victims of their search are violating immigration laws.

The above comparisons explain why this Court rejected the government analogy to administrative inspection decisions to support the constitutionality of roving stops and searches conducted by the Border Patrol. *Almeida-Sanchez, supra* at 272. "*Colonnade* and *Biswell* cannot fairly be read to cover cases of the present type." *Almeida-Sanchez, supra* at 281. (Powell concurring). The government's continued reliance on these cases is misplaced. (Brief for Pet. 19, 26)

2. Petitioner's distorted application of Justice Powell's concurring opinion in *Almeida-Sanchez* does not sustain causeless, warrantless checkpoint searches.

In seeking a constitutional justification to support its immigration roadblock at San Clemente, petitioner also relies heavily upon the concurring opinion of Justice Powell in *Almeida-Sanchez, supra* at 275-285. Justice Powell stated that given the Border Patrol's difficult mandate in enforcing the immigration laws in the border area, under certain prescribed circumstances the

"functional equivalent of probable cause"[5] may exist for the type of immigration searches conducted by the roving Border Patrol check. (*Id.* at 277). Recognizing that the standards for a functional equivalent of probable cause in the context of immigration searches are relatively unstructured, Justice Powell suggested four relevant factors[6] which would merit consideration in the probable cause equivalency formula. (*Id.* at 283-284). It is significant to note that petitioner does not even attempt to satisfy those criteria.

Petitioner points to the number of aliens apprehended at the San Clemente roadblock (Brief for Pet. 26) but fails to demonstrate how these statistics differ from every road leading north from the border in the southwestern United States. One of the factors in Justice Powell's probable cause equivalency formula is the proximity of the area in question to the border. *Almeida-Sanchez, supra* at 284. The San Clemente immigration roadblock is located 66 miles north of the international border. Since the activity of the Border Patrol along the border draws "a large measure of

[5] The functional equivalent of probable cause is a new concept and without the clearly articulated standard that could be announced by statute or court rule (i.e. amendment to Rule 41, *Federal Rules of Criminal Procedure*). The respondent suggests adherence to the traditional test for probable cause. *Beck v. Ohio*, 379 U.S. 89, 96 (1964).

[6] The four factors are: a) frequency of deportable aliens in a particular area; b) proximity of area to the border; c) geographic characteristics of the area; and d) degree of interference with the rights of innocent persons taking into account the scope and duration of the search and the concentration of illegal alien traffic in relation to general traffic in the area. 413 U.S. 283-284.

justification from the Government's extraordinary responsibilities and powers with respect to the border," (*Id.* at 270) it follows that the further away from the border, the less compelling petitioner's argument for a roadblock of all vehicular transportation on the busiest highway in California south of Los Angeles.

Another of Justice Powell's considerations in the probable cause equivalency formula is "the extensiveness and geographic characteristics of the area, including the roads therein and the extent of their use, . . . " (*Id.* at 284). The consideration supporting this factor is that along much of the Mexican-American border "there are vast areas of uninhabited desert and arid land which are traversed by few, if any, main roads or highways, but which nevertheless may afford opportunities–by virtue of their isolated character–for the smuggling of aliens." (*Id.* at 284, n.4) The roadblock at San Clemente, some 66 miles north of the border, hardly fits within this subcategory. The roadblock is on a busily-traveled interstate highway with vehicles traversing the checkpoint at an annual rate in excess of ten million. Further, the roadblock is located between the two most populous cities in California and directly north of ten other Southern California communities. The premise underlying this factor of geographic character is that in isolated areas between ports of entry *along the border* there are great opportunities for unauthorized entries and smuggling ventures to take place. The San Clemente checkpoint is on Interstate 5 which emanates from the San Ysidro port of entry. Thus, the trickle of traffic emanating from the border has been subjected to border inspection and faces a further intrusion at the San Clemente checkpoint. More important, most of the

traffic at San Clemente does not emanate from the border at all.[7]

The final and most important consideration in the formula is "the probable degree of interference with the rights of innocent persons, taking into account the scope of the proposed search, its duration, and the concentration of illegal alien traffic in relation to the general traffic of the road or area." (*Id.* at 284) The San Clemente roadblock involves a two-stop procedure. All traffic is stopped initially for a visual examination of the occupants and interior of the vehicle by the point officer. During this inspection, the point officer makes a decision to refer the vehicle off the highway for a more extensive and intrusive examination or to allow it to proceed. While the degree of intrusion of the millions of vehicles that are stopped yearly at primary is less substantial than that which occurs at secondary,

[7]Defense Exhibit C at the *Baca* hearing indicates that the traffic flow of major highways, including Interstate 5, is insubstantial in the areas close to the border, but demonstrably increases north of San Diego.

it must be noted that 99.9% of all vehicles stopped at this checkpoint contain no immigration law violators.[8]

Neither the Petitioner's Brief nor the record satisfies the four factors in the probable cause equivalency test cited in Justice Powell's concurring opinion. In addition to lacking a factual record to support a functional equivalent of probable cause theory, petitioner also seeks to eliminate the warrant requirement from Justice Powell's requirements. Although this brief considers the warrant argument below, respondent submits that such omissions improperly separate the equivalency formula from the warrant requirement to distort and misplace application of Justice Powell's opinion.[9] Justice Powell

[8] The return on the warrant of inspection in *United States v. Martinez-Fuerte, supra* note 4, revealed that 145,960 vehicles passed through the San Clemente checkpoint during a 124 hour period of operation. Of these vehicles, only 171 were found to contain deportable aliens, or 0.12% of all vehicles passing through the checkpoint. Thus, the initial intrusion involving the point stop violated the right to free movement of all the motorists who were traveling through the checkpoint, 98.88% of whom had no illegal alien passengers. Since many vehicles contain more than one passenger, the ratio between the concentration of illegal aliens in relation to the individuals violating no immigration law in the area is substantially increased, i.e., less than .01%. This Court may take judicial notice of adjudicative facts now before the Ninth Circuit Court of Appeals. *See Proposed Federal Rules of Evidence* § 201; *Lambert v. Conrad*, 308 F.2d 571 (9th Cir. 1962).

[9] The petitioner's singular appeal to Justice Powell is inappropriate (Brief for Pet. 17, n.7), for the action of the Court should depend upon the interaction of collective reasoning following the traditional concepts of *stare decisis*. The disclaimer that the petitioner is not seeking to overrule *Almeida-Sanchez* appears inconsistent with the reasoning put forth. The petitioner always has the right to urge an overruling, but should say so.

suggested that reasonable roving Border Patrol searches could be made within the interior of the United States when supported by the functional equivalent of probable cause determined by a judicial officer and authorized by a search warrant. This relaxation of the probable cause requirement may not be separated from the requirement of prior judicial review. The concept of the equivalency of probable cause was articulated in connection with a warrant requirement. The petitioner's conversion of this concept to permit the officer on the scene to make a judgment where and when the equivalent of probable cause exists is incompatible with Fourth Amendment doctrine requiring the intervention of the judiciary.

3. Checkpoints such as at San Clemente have a mixed administrative-criminal investigation purpose characterized by armed agents conducting searches and making arrests which lead to the incarceration, prosecution and/or deportation of those apprehended.

The probable cause equivalency concept pronounced in *Camara v. Municipal Court*, 387 U.S. 523 (1967), was applied only to a purely administrative health inspection. It is inapplicable to the criminal law enforcement program conducted at the San Clemente roadblock. *Camara* held that administrative home inspections to enforce community health and welfare regulations could be made with warrants without the necessity of an evidentiary basis directed at particular dwellings. Petitioner's reliance on *Camara* is misplaced because even in the administrative atmosphere of housing code inspections, a warrant is required. Further, the

administrative characterization of code enforcement has no equivalent in the setting of checkpoint searches for aliens. Congress may elect to make it so, but it has not acted.

The primary purpose of the San Clemente checkpoint, according to the petitioner, is administrative rather than criminal law enforcement. (Brief for Pet. 27) Respondent submits that the purpose of the checkpoint is twofold: a) to locate illegal aliens and deport them, and b) to detect, arrest, and prosecute repeat-violator illegal aliens and alien smugglers. As stated by the district court in *Baca*:

> "The primary objective of the checkpoint is to intercept vehicles or conveyances transporting illegal aliens, or non-resident aliens admitted with temporary border passing cards (I-186), *with particular attention being paid to vehicles operated by smugglers or transporters destined for inland cities in violation of 8 U.S.C. §1324.*" *United States v. Baca*, 368 F. Supp. 398, at 406 (S.D. Calif. 1973). [Emphasis supplied]

According to the *United States Border Patrol Handbook:* "The primary purpose of this [traffic inspection] operation is to locate deportable aliens and smugglers of aliens attempting to travel to the interior of the United States after evading detection at the border. Secondarily, assistance is rendered to the Bureau of Customs in the enforcement of statutes which relate to the smuggling of contraband." [Government Exhibit 43, 9-1, B.Tr. 483-484]

As a result of all Service operations in fiscal 1973, "officers presented about 40,000 cases to United States Attorneys for possible prosecution and . . . prosecution was authorized in 40% of the cases." *Hearings, infra* note 24 at 288.

Every car search at a checkpoint which is found to contain illegal aliens involves a possible violation of 8 U.S.C. §1324(a)(2) by the driver, a felony statute punishable by five years in prison for each alien transported. The hearings in *Baca* demonstrated the criminal investigative nature of the operation of the San Clemente checkpoint. Deputy Chief Border Patrol Agent of the Chula Vista Sector, Richard E. Batchelor, testified that Border Patrol officers are trained in the use of firearms such as .357 magnum revolvers and shotguns. (B.Tr. 255) Batchelor testified that Border Patrol officers are law enforcement officers and not mere administrative clerks. (B.Tr. 256) Border Patrolmen at the checkpoint are in full dress uniform armed with a revolver at the waist. (B.Tr. 289) According to Chief Patrol Agent of the El Centro Sector of the Border Patrol, Henry C. Felchlin, when an arrest is made at a checkpoint of an illegal alien, the alien is immediately advised of his rights per *Miranda v. Arizona*, 384 U.S. 436 (1966). (B. Tr. 395) A personal search of the arrested individual is made. (*Id.*) The Acting Commissioner of Immigration and Naturalization Service, James F. Greene, testified that the primary function of the United States Border Patrol is preventing illegal entry, apprehending those who have illegally entered and arresting alien smugglers. (B. Tr. 16)

A reading of the testimony of United States Magistrate Harry McCue at the *Baca* hearing is fundamental to an understanding of the criminal investigative nature of the checkpoint. Magistrate McCue explained the prosecution procedure of the United States in the Southern District of California involving defendants who are apprehended in the

context of alien smuggling. A typical complaint is worded in two counts, one charging a violation of felony transportation of illegal aliens under 8 U.S.C. §1324(a)(2) while the second count is a misdemeanor charging a violation of aiding and abetting the illegal entry of aliens under 18 U.S.C. §2 and 8 U.S.C. §1325. (B. Tr. 457) The purpose of this type of complaint is to give the accused an opportunity to plead to a misdemeanor as soon as possible. Since all of the aliens located in a vehicle driven by an accused smuggler must be incarcerated to provide the defendant an opportunity to examine them for possible exculpatory evidence, this unique complaint procedure allows an accused to plead guilty to a misdemeanor and for the prompt release of the alien witnesses to Mexico. *See United States v. Mendez-Rodriguez*, 450 F.2d 1 (9th Cir. 1971) (B Tr. 457). Magistrate McCue testified that all such cases could be prosecuted on a felony basis alone if the government so elected.

> "I don't think there is any question about that. That all the defendants who are charged criminally, under the immigration laws, could have been charged with felony violations of the immigration laws, . . ." (B. Tr. 458)

He also testified that the reason rather substantial jail terms are handed out to defendants in magistrate court is that the latter court is faced with processing felony alien smuggling cases on a misdemeanor level. (B. Tr. 458)

When aliens are found in a vehicle at a checkpoint, the individuals in the vehicle are treated by the government as either criminal defendants or material witnesses. (B. Tr. 464) The election whether to charge

the individual as an illegal entrant, a smuggler, or a material witness detained for possible court testimony is that of the government. (B. Tr. 464)

Magistrate McCue testified that two of the three full-time magistrates in the Southern District of California (excluding from consideration two part-time magistrates) handled in 1971 and 1972 about 7,000 immigration cases each year. (B. Tr. 464) Virtually none of these prosecutions involved illegal entrant passengers of vehicles who were merely being transported or attempting to enter on foot. (B. Tr. 464-465) Of the 7,000 prosecuted per year, approximately 40% were permanent resident aliens or citizens of the United States. (B. Tr. 467) Of this group of individuals having a legal right to be here, the vast majority of their prosecutions involve smuggling violations. Because the government usually does not choose to prosecute the simple illegal alien entrant, only those with an aggravated history of repeated entry or those who elect to drive other illegal aliens are prosecuted.

In sum, the prosecution pattern in the Southern District of California reveals thousands of prosecutions for smuggling violations. This prosecution scheme involves not only the arrest of the driver of a vehicle, but also the detention of all the illegal aliens, who are retained and incarcerated in the United States to insure the defendant and the government a fair trial. (B. Tr. 470) The illegal alien entrant apprehended at a checkpoint is not simply administratively processed and deported to Mexico. With the arrest of a smuggler for prosecution, all of the aliens must be held in custody as

material witnesses. (B. Tr. 470)[10] To these material witnesses who are not officially charged with any crime, the fact that they are jailed, wear prison clothing, shackled with handcuffs and chains when they come to court, and imprisoned alongside convicted felons and others accused of serious felonies, it makes little difference whether the label for processing be termed criminal or administrative. The result is the same—they are treated like criminal defendants. *See Hurtado v. United States*, 410 U.S. 578 (1973); Henry, *The Wetback as a Material Witness: Pre-Trial Detention or Disposition*, 1 *Cal. West L. Rev.* 175 (1970).

The *Baca* hearing also demonstrated that Border Patrol officers of the Service are bona fide law enforcement officers and not merely administrative functionaries. (B. Tr. 255-256) The Service often invites representatives from the Drug Enforcement Agency and Customs, if they wish, to join them at the check-

[10]The Ninth Circuit has decided numerous cases within a criminal law context involving illegal alien material witnesses: *United States v. Carrillo-Frausto*, 500 F.2d 234 (9th Cir. 1974); *United States v. Tsutagawa*, 500 F.2d 420 (9th Cir. 1974); *United States v. Lewis*, 460 F.2d 257 (9th Cir. 1972); *United States v. Verduzco-Macias*, 463 F.2d 105 (9th Cir. 1972); *United States v. Moran*, 456 F.2d 1066 (9th Cir. 1972); *United States v. Peyton*, 454 F.2d 213 (9th Cir. 1971); *United States v. Neustice*, 452 F.2d 123 (9th Cir. 1971); *United States v. Mendez-Rodriguez*, 450 F.2d 1 (9th Cir. 1971).

In 1973, 291,544 deportable aliens were incarcerated in INS (171,559) and other jail-type institutions (120,985). Mexican aliens accounted for 94.6% of this total. 1973 *Annual Report*, 15.

points.[11] Immigration officers have been designated as acting Customs agents by a series of delegations of authority held proper in *United States v. Thompson*, 475 F.2d 1359 (5th Cir. 1973). While Border Patrol officers are investigating for alien smuggling violations, their intrusive searches often reveal other violations such as the possession of various forms of controlled substances. "Border Patrol officers . . . encountered and released to appropriate agencies 3,342 violators of other laws, including 1,984 violators of narcotics laws." Department of Justice, *1973 Annual Report of Immigration and Naturalization Service*, 12 (1973) [hereinafter cited as *1973 Annual Report*]. "Incident to the primary mission of immigration law enforcement, Service Officers seized over 98 tons of marijuana . . . [and helped seize] 1456 ounces of hard drugs . . ." *(Id.)* However, the temptation of Border Patrolmen to conduct baseless searches for contraband in areas of a vehicle where no alien could be hidden is often not resisted. *E.g. United States v. Lujan-Romero*, 469 F.2d 683 (9th Cir. 1972) (search of footlocker); *Valenzuela*

[11]The INS calls the Border Patrol one of its "enforcement arms." *1973 Annual Report* 8. The INS states that its officers often lecture at various police schools and academies and conduct courses for enforcement officers. (*Id.* at 12) Border Patrolmen wear INS uniforms with guns and drive marked cars complete with flashing red lights. When an individual dresses like a policeman, has a gun and handcuffs like a policeman, arrests people and gives *Miranda* warnings on INS printed cards like a policeman, and drives people to jail in marked cars like a policeman, it seems safe to say he is a policeman. To label him "administrative personnel" is to be "ignorant as judges of what we know as men." *Watts v. Indiana*, 338 U.S. 49, 52 (1949). *See Dyas v. Superior Ct.*, 11 Cal. 3d 628, 636 (1974) (city housing authority patrolman deemed performing a police function).

-Garcia v. United States, 425 F.2d 1170 (9th Cir. 1970) (search of 6-8 inch compartment in car); *Roa-Rodriguez v. United States*, 410 F.2d 1206 (10th Cir. 1969) (search of jacket); *United States v. Winer*, 294 F.Supp. 731 (W.D. Tex. 1969) (search under seat of small automobile); *United States v. Hortze*, 179 F.Supp. 913 (S.D. Cal. 1959) (search of package of cigarettes). It makes sense that a Border Patrol officer, empowered to enforce both immigration and customs laws, should be guided by the same standard of probable cause before commencing a search for aliens or narcotics.[12]

Unlike the health and safety code inspector whose primary function is to detect safety violations in order to prevent safety hazards to the public generally, the function of the checkpoints is a mixed omelet of criminal investigation to arrest and prosecute smugglers and illegal aliens as well as finding and deporting illegal aliens. In *Camara*, criminal prosecution was the rare exception. With Border Patrol checkpoints in the Southern District of California, criminal prosecution is the rule involving thousands of defendants each year.

The inspections authorized in *Camara* were unlike a criminal investigation since their purpose was to secure citywide compliance with safety ordinances. In contrast, once an individual driving a vehicle on an interstate highway well within the borders of the United States is directed off the highway by an armed Border Patrol

[12]Circuit Judge Browning, dissenting in *United States v. Almeida-Sanchez*, 452 F.2d 459, 462 (9th Cir. 1971) pointed out the anomaly of Customs officers being subject to probable cause requirements to stop and search a vehicle while the Border Patrol claimed to be free from such limitations in searching vehicles for aliens.

officer and subjected to interrogation concerning his citizenship, the status of any occupant in the car, and a search of the trunk, hood, and seat area of the vehicle, a personal criminal investigation aimed at the discovery of evidence of crime has taken place.[13] If a violation is discovered, an arrest occurs in *every* case.

4. Inland fixed checkpoints are but one of numerous Border Patrol operations to deter aliens from illegally entering the United States.

Camara recognized that there was almost unanimous agreement that the *only way* to enforce housing codes is by periodic inspection of all buildings within a geographic area. The United States Border Patrol is not limited to permanent checkpoints miles within the United States as a means of deterring illegal alien entry. The primary defense against illegal alien entry should be at the border. Acting Immigration and Naturalization

[13]In examining the criminal investigation nature of the San Clemente checkpoint, it is the *quality* of the intrusion, i.e. a forced stop and search by armed agents for illegal aliens and smugglers, that should be the focus of scrutiny rather than the penalties or *quantity* of prosecutions which result. As this Court stated in *Carroll v. United States*, 267 U.S. 132, 155-156 (1925):

> "The rule for determining what may be required before a seizure may be made by a competent seizing official is not to be determined by the character of the penalty to which the transporter may be subjected.
>
> * * * * *
>
> "The measure of legality of such a seizure is, therefore, that the seizing officer shall have reasonable or probable cause for believing that the automobile which he stops and seizes has contraband liquor therein which is being illegally transported."

Service Commissioner Greene testified in *Baca* that the ideal place for stopping and deterring illegal alien entry is at the border. (B. Tr. 53, 60) Checkpoints well within the United States are merely one of many secondary supports to the watch that takes place at the border. (B. Tr. 72-73) In fact there are at least nine other Border Patrol operations which are utilized to deter and apprehend illegal aliens. (B. Tr. 111) These functions include, for example, inspections at or very near the border itself (B. Tr. 111), patrol car observation in areas somewhat removed from the immediate border areas (B. Tr. 112), farm and ranch checking (B. Tr. 112), public transportation inspections of buses, passenger trains, freight trains, and aircraft usually at transportation terminals (B. Tr. 113), metropolitan patrols (B. Tr. 113), industrial checking (B. Tr. 113), and a boat patrol and stowaway inspection program (B. Tr. 114). Other law enforcement agencies turn over a substantial number of deportable aliens to the Border Patrol. (B. Tr. 114) In fact, the total number of illegal aliens apprehended by other agencies and turned over to the Border Patrol exceeds the total number of aliens captured by all checkpoint operations. (B. Tr. 231)

In addition to these alternative operations to deter and apprehend illegal alien entrants, the Border Patrol also has the power to stop all vehicles and persons at points which constitute the functional equivalent of the border. *Almeida-Sanchez, supra* at 273; *see also United States v. Byrd*, 483 F.2d 1196, 1199, n. 7 (5th Cir. 1973), where a point seven miles north of the international border was plausibly a functional equivalent. Many other stops and searches away from the

border may be conducted by the Border Patrol where there is "a reasonable certainty" that persons have just crossed the border illegally and entered a vehicle. *United States v. Markham*, 440 F.2d 1119 (9th Cir. 1971); *United States v. Weil*, 432 F.2d 1320 (9th Cir. 1970). Also, extended border searches are permissible anywhere in the United States if continuous surveillance of a vehicle from the border has been maintained by the Border Patrol. *Alexander v. United States*, 362 F.2d 379 (9th Cir. 1966). In addition, the Ninth Circuit has approved roving Border Patrol stops of vehicles in border areas where the agent has a "founded suspicion" to believe criminal activity is afoot.[14]

In addition, the Border Patrol has put into use "electronic intrusion alarm systems along the northern and southern borders." 1973 *Annual Report* 9 (1973). With the above considerations in mind, the Ninth Circuit Court of Appeals concluded that:

> "We are not persuaded that laws prohibiting illegal immigration will be rendered simply unenforceable should we deny to the government the power to stop and search automobiles, without probable cause or a warrant, at fixed checkpoints." *United States v. Bowen*, 500 F.2d 960, 965 (9th Cir. *en banc* 1974).

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[14] *United States v. Mora-Chavez*, 496 F.2d 1181 (1974) (car stop near border after electronic sensor activity alerted agents to possible border intrusion); *United States v. Jaime-Barrios*, 494 F.2d 455 (9th Cir. 1974) (investigative stop approved based upon agent's knowledge of high smuggling in area, lack of recognition of the vehicle or driver); *United States v. Bugarin-Casas*, 484 F.2d 853 (9th Cir. 1973) (Mexican-appearing driver of typical vehicle used in smuggling ventures which was riding low in the rear in an area of high smuggling activity).

The General Accounting Office has noted the lack of inter-agency cooperation in combating the illegal alien problem. While the Service reports that efforts to solicit the aid of the Department of Health, Education and Welfare, the Internal Revenue Service, and the Social Security Administration have begun, this is an area which if developed would not only detect aliens unlawfully within the United States, but would deny them welfare, unemployment, educational and other benefits. *See* 1973 *Hearings infra* note 24 at 115-119. Such a multi-agency approach would provide considerable deterrent impact to illegal alien entry and is a potent alternative now available.

It is with Congress, however, that the primary deterrent to the entry of illegal aliens may be found. It is no secret that the vast majority of illegal aliens entering this nation come to find employment. Legislation to make the knowing employment of illegal aliens a crime has languished in Congress for several sessions.[15] One Ninth Circuit jurist noted 21 years ago

[15]H.R. 982, the "Rodino Bill," 93d Cong., 1st Sess. (1973) passed the House of Representatives on 3 May 1973 after clearing the House Judiciary Committee by a 30 to 2 vote. The Senate has never acted on it. Current criminal statutes not only do not discourage employers from hiring illegal aliens, but have the opposite effect. Title 8 U.S.C. §1324(a)(3) makes it a felony to conceal, harbor, or shield illegal aliens. However, the last sentence of the section reads: "Provided, however, that for the purposes of this section, employment (including the usual and normal practices incident to employment) shall not be deemed to constitute harboring." James D. McKevitt, Assistant Attorney General for Legal Affairs, testified before the House Judiciary Committee that:

> "Not only is the employment of unlawful aliens not illegal under present law, but such employment actually appears

that the "employment of . . . aliens is primarily responsible for the whole Mexican alien problem." *Herrera v. United States*, 208 F.2d 215, 218 (9th Cir. 1953) (Pope concurring). Testimony in *Baca* by Acting Commissioner Greene indicated that passage of such legislation "would be one of the greatest deterrents oncoming." (B. Tr. 90)

5. Inland permanent checkpoints not at the functional equivalent of the border are ineffective in deterring illegal alien entry into the United States.

The *Baca* hearings demonstrated that none of the operations of the Border Patrol have been effective in deterring illegal aliens from entering the United States. (B. Tr. 25, 125). The current Service Commissioner's estimate that up to twelve million aliens are illegally here (Brief for Pet. 21, n. 8) renders claims of the deterrent effect of checkpoints (Brief for Pet. 25) hollow.

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to be condoned by the existing provision in Section 247(a)(4) that employment shall not be deemed to constitute harboring of aliens." *Hearings Before Subcommittee Number 1 of Committee on the Judiciary*, House of Representatives, 93d Cong. 1st Sess. 7 (March 7, 1974).

The problem in California is heightened by recent state court rulings nullifying *California Labor Code* Section 2805 which provided penalties for knowingly employing illegal aliens under certain conditions. In *De Canas v. Bica*, 40 Cal. App. 3d 976 (1974), a California court of appeals declared the section unconstitutional ruling that the states have no power to legislate with respect to immigration, the federal government having preempted the field.

Petitioner argues that inland checkpoints are essential to the effective enforcement of the immigration laws because of the highly effective nature of their operation. (Brief for Pet. 23-25) The government finds itself without a record to support these claims. We have only to look around us at the millions of illegal aliens currently living and working in the United States to see that the deterrent value of inland immigration roadblocks has been negligible. For example, for the fare of $8.37, an alien may purchase a plane ticket from San Diego to Los Angeles and completely bypass the San Clemente roadblock as well as the two other strategically located traffic checkpoints (Temecula and Oak Grove) in the Chula Vista Sector of the Southern District of California. (B. Tr. 248) Another means of successfully avoiding checkpoints, as related by the Border Patrol in *Baca* is for the aliens to be let out of the smuggling vehicle before reaching a checkpoint and simply walk around it. (B. Tr. 279) Additionally, checkpoints can be easily evaded when they close during inclement weather, heavy traffic, or due to a lack of available manpower. (B. Tr. 320-321)

All Border Patrol checkpoints during fiscal year 1973 accounted for only 8% of the deportable aliens arrested for illegal entry or violating the terms of

permits.[16] In measuring the effectiveness of the immigration roadblock at San Clemente, the ratio between those illegal aliens traversing through the checkpoint and those that are detected and arrested should be examined. Although petitioner can point to no record of this efficiency ratio, Border Patrol records and affidavits[17] indicate that San Clemente captures only about 5% of the alien traffic traversing through it north on Interstate 5.

Even more disturbing than the inefficient operation of the roadblock at San Clemente, is the militaristic

[16]In fiscal year 1973, 655,968 deportable aliens who had either surreptitiously entered (551,328) or violated the terms of their permits (104,640) were apprehended. 1973 *Annual Report* 8-9 (1973). "In United States, during fiscal year 1973, approximately 55,300 deportable aliens were apprehended by Border Patrol agents working traffic checking operations." *United States v. Baca,* 368 F. Supp. 398, 407 (S.D. Cal. 1973). By dividing the number of apprehensions at traffic checking operations by the total number of aliens arrested, the 8% figure is achieved. It should be noted that since much of fiscal year 1973 involved roving checking operations, and because traffic checking operations involve more than permanent checkpoint operations, the percentage of aliens captured at permanent roadblock operations is a lesser percentage.

[17]In *United States v. Amado Martinez-Fuerte, supra,* n. 4, government figures reflect that about 319,000 illegal aliens traverse Interstate 5 each year. Government affidavits in *Martinez-Fuerte* also reflect that less than 17,000 allegedly illegal aliens were apprehended in 1973 at San Clemente out of the estimated 319,000 who had traversed north by that route. Thus, only about 5% of the illegal alien traffic going through the San Clemente roadblock is apprehended.

"zone defense" concept[18] of deterring and apprehending illegal aliens. Although the Acting Commissioner testified in *Baca* that the border itself is the ideal location to apprehend aliens (B. Tr. 60), the testimony of the supervisory Border Patrol agents clearly demonstrated that no real attempt at border apprehensions is made. In fact, the border is deprived of Border Patrol personnel in order to keep the inland checkpoints running. The two supervising Border Patrol agents for the two sectors (Chula Vista and El Centro) responsible for the entirety of the California-Mexican border testified that there is little or no fence between the United States and Mexico in their sectors. For example, the 75 miles of border area in the El Centro Sector only has five miles of fence. (B. Tr. 369) In the Chula Vista Sector, the fence is "frequently down" (B. Tr. 220) and at "any given moment, you can find large gaping holes in the cyclone fence." (B. Tr. 221) In some areas of well-known smuggling activity in the Chula Vista Sector such as Smuggler's Gulch, no fence has ever been erected. (B. Tr. 242) Budgetary requests

[18]The Border Patrol has evidently adopted a strategy similar to that of the Japanese Imperial General Headquarters during World War II. In seeking a defense to the American invasions of Japanese occupied islands in the Pacific, innovative tactics were devised:

> "The new tactics were to prepare a main line of resistance and defensive positions well in the rear of the beaches, place substantial forces in reserve to mount counterattacks at opportune moments, and offer token defense only at the beach." S.E. Morison, *The Two-Ocean War*, 426 (Little Brown 1963).

This strategy has proven an utter failure at stemming invasions at the first line of defense—the border. In fact, there is no real attempt to do so.

of Congress for finances to keep the fence in repair have been stricken for many years. (B. Tr. 243).

The most dramatic evidence of the Border Patrol's lack of enforcement at the border is evidenced by its manpower commitments to the border and the inland checkpoints. For example, the supervising Border Patrol agent for the El Centro Sector testified that during the midst of a typical day only ten officers were committed to cover the seventy to seventy-five miles of border in his sector. (B. Tr. 357) The supervising agent for the Chula Vista Sector indicated that during the middle of a typical week day, approximately twenty Border Patrol officers would be committed to cover the seventy miles of his sector (B. Tr. 229). Although both of the supervising agents complained that they have not been authorized enough personnel (B. Tr. 227, 400), the fact remains that more personnel is devoted to the operation of inland checkpoints than to covering the border area.[19] In fact, the number of officers devoted to

[19]In *Baca*, the *Border Patrol Handbook* was introduced as Government Exhibit 43. A permanent checkpoint like that at San Clemente requires a huge manpower commitment to operate 24 hours a day. A permanent checkpoint operation requires one or two officers to maintain a point position in the middle of the highway to refer traffic to secondary. A second officer working with an interrogator and stationed near a patrol vehicle mans the secondary position. (Govt. Exhibit 43, 9-16) Officers manning the point position must be rotated frequently to avoid fatigue inherent in this type of operation. (*Id.* at 17) Personnel must be available in case a vehicle runs through the checkpoint or turns around before arriving. (*Id.* at 18) To guard against aliens walking around the checkpoint, frequent patrols on both sides of the checkpoint are required. (*Id.* at 3) *See also* B. Tr. 291. Richard E. Batchelor testified that twenty officers are assigned to the immediate border area in the Chula Vista Sector on a typical week day; forty-seven are stationed at the San Clemente checkpoint. (B. Tr. 229, 267).

border duty is insufficient to even respond to electronic sensor alerts which indicate the possibility of aliens crossing the border. (B. Tr. 227)

The proof of the current ineffective border placement of officers was demonstrated in 1969 during "Operation Intercept." At that time a significant manpower commitment was made to the border area with the immediate effect of acting as an effective deterrent to aliens from Mexico illegally entering the United States. (B. Tr. 258, 435). This result was obtained simply by increasing the number of officers at the border by an increment of 57. (B. Tr. 437)

In sum, the "zone defense" articulated by the Border Patrol in *Baca* reveals a mere token commitment of officers to the vast stretches of the immediate border area. This is true even though the primary defense is said to be at the border. (B. Tr. 53) The "zone defense" concept (B. Tr. 162, 166) provides the government a bootstrapping argument by which it claims it is impossible to efficiently patrol the Mexican-American border, but because of its reliance on inland checkpoints it makes no manpower commitment there. When the Border Patrol's commitment to the so-called "first line of defense" is at best token, it is understandable why so many deportable aliens are arrested at inland checkpoints and why millions of others escape detection. Only thirty officers are devoted to patrolling the entirety of the California-Mexican border on a typical day. (B. Tr. 229, 357) At the same time, forty-seven officers are needed for the daily operation of the San Clemente checkpoint which is but one of the nine checkpoints in California. (B. Tr. 267) Until the government makes a sincere commitment to

apprehending and deterring aliens at the border, it cannot point to self-created manpower shortages there to justify the existence of inland checkpoints.

6. Inland checkpoints in excess of 25 miles from the border cannot be justified because temporary visitors from Mexico with I-186 cards allegedly violate the terms of their documents.

The government, in support of its inland checkpoint operations, states that only a roadblock located in excess of 25 miles north of the international border will allow for the detection of aliens with local passports (I-186) who violate the terms of their cards. (Brief for Pet. 26) The Immigration and Naturalization Service states, however, that only an insignificantly small number of aliens crossing the border with cards violate the terms of their entry cards:

> "There is very little correlation between the problems relating to border crossers and illegal aliens. In the first instance, the problems relating to the border crossers are very minimal. The non-immigrant who enters presenting Form I-186, may not work lawfully in the United States and in order to go beyond the 25-mile limit, he must first secure permission from the admitting official at which time he is issued a special form. On each occasion that he is questioned by an immigration officer, he must present his entry document and if found working, he is amenable to deportation proceedings . . .
>
> "The illegal alien or 'wetback' is something else. He enters the United States surreptitiously, usually under cover of darkness. He employs the assistance of smugglers if he has the funds, and has

nothing to lose if he is apprehended unless it can be established that he is an aggravated violator, in which case he might be prosecuted for illegal entry." *Hearings Before the Subcommittee on Immigration, Citizenship, and International Law of the Committee on the Judiciary of the House of Representatives*, 93d Cong. 1st Sess., 160 (1973).

Resort to the record of apprehensions at checkpoints demonstrates that I-186 card holders are a negligible factor in checkpoint apprehensions. In the El Centro Sector, the total number of deportable aliens arrested in fiscal 1973 was 23,125. (B. Tr. 347) During that time period, 1,098 deportable aliens were arrested for violating their terms of their entry documents. "Some of these would be people who entered with what we call the I-186, . . ." (Br. Tr. 348) Even assuming all of the latter to be I-186 card holders, and assuming all of the apprehensions occurred at checkpoints,[20] this amounts to less than 5% of the total number of deportable aliens apprehended in the El Centro Sector. In fiscal year 1973, 1,440,277 Mexican temporary visitors were admitted to the United States pursuant to Section 101(a)(15)(B) of the Immigration and Nationality Act, i.e., with I-186 cards. Of this total, only 4,975 or .003% were apprehended at alien checkpoints within

[20]Of the 23,125 deportable aliens apprehended in the El Centro Sector during 1973, traffic checking operations accounted for a total of 3,825 or about 16%. If this ratio of checkpoint apprehensions to total apprehensions holds true for I-186 card holders, then traffic checking operations accounted for less than 170 such apprehensions during fiscal year 1973.

the United States while violating the terms of their admission.[21]

The evidence itself suggests the weakness of the government's argument that checkpoints are needed to apprehend I-186 card holders violating the terms of their documents. Even the INS agrees that there is no correlation between the few violations by such card holders and the problems of illegal aliens. Further, the alternatives for deterring and detecting illegal aliens, previously discussed *supra* at section IB(4), are equally available to detect and deter the unauthorized use of an I-186 card.

C. The Traditional Fourth Amendment Definition of Probable Cause Applies to Warrantless Stops and Searches at Immigration Checkpoints not Located at the Functional Equivalent of the Border.

In *Almeida-Sanchez* this Court looked to traditional Fourth Amendment cases involving warrantless vehicle stops and searches in measuring the legality of the government action: "Automobile or no automobile, there must be probable cause for the search." 413 U.S. 269. The opinion relied upon *Carroll v. United States*, 267 U.S. 132 (1925), and subsequent automobile search

[21] 1973 *Annual Report* 58; B. Tr. 92. Dividing the number of temporary Mexican visitors lawfully admitted but apprehended at checkpoints while violating the terms of their entry (4,975) (B. Tr. 92 and Gov't. Exhibit 12) by the total number of such Mexican visitors lawfully admitted (1,440,277) (1973 *Annual Report* at 58) during fiscal 1973 reveals that .003% of the persons holding I-186 cards were apprehended at checkpoints violating the terms of their permits.

cases requiring probable cause to search a vehicle. 413 U.S. 269, n. 1.

Justice Powell joined in the opinion of the majority stating "that none of our Fourth Amendment decisions supports the search conducted in this case, . . ." *Id.* at 275. His concurring opinion concerned an issue not presented by the facts of *Almeida-Sanchez* or this case, whether a roving search would be sustainable if it were based on the functional equivalent of probable cause and a warrant.

1. There is no authority for petitioner's assertion that warrantless, causeless stops and searches at the checkpoints may be based upon a Border Patrolman's conclusion that the functional equivalent of probable cause exists to believe that vehicles containing immigration law violators will pass through a checkpoint.

This Court has only sustained warrantless administrative inspections where a detailed authorizing statute exists to offer the protections to the citizenry that a warrant ordinarily offers. The government asserts that the public is protected when the Border Patrol, acting under a general statute, 8 U.S.C. §1357(a)(3), which offers no guidelines or limitations on its conduct, operates permanent checkpoints wherever and whenever the agency or one of its officers determines there to be a "functional equivalent" of probable cause to believe that immigration violations are being committed.

The Fourth Amendment requirement of reasonableness in searches is the standard by which a decision to search is tested. In the criminal context, probable cause requires the showing that something connected with criminal conduct will probably be found in the place to be searched. In the administrative context, inspections are deemed reasonable where they are preventive in purpose and reasonable legislative and administrative standards exist for conducting such inspections. With respect to Border Patrol checkpoints such as at San Clemente, both criminal investigative and administrative purposes exist. However, the reasonableness requirement is not met in either context. There is no demonstration that the cars searched more probably than not contain aliens, nor is there an authorizing statute or administrative regulation containing standards for the time, place, and scope of such inspections. *See* Note, *Inspections by Administrative Agencies: Clarification of the Warrant Requirement*, 49 *Notre Dame Lawyer* 879 (April 1974). In fact, as petitioner concedes, an individual Border Patrolman standing in the middle of Interstate 5 stops all traffic for a cursory visual inspection and routinely chooses any vehicle he desires for a more intrusive stop, interrogation, and search at secondary. (Brief for Pet. 32)

2. Checkpoint stops and searches involve multiple intrusions upon the constitutionally-protected rights of an entire traveling public.

A person traveling in a vehicle on an interstate freeway at 55 miles per hour has a reasonable expectation of privacy that he shall not be forced by a

show of authority to come to a complete halt and be directed off of the highway, interrogated by a Border Patrolman, and ordered to open the hood and trunk of the automobile. There are at least five related privacy interests protected by the Fourth Amendment which are invaded by such checkpoint procedure.[22]

1) Freedom from arbitrary governmental interference.

The most important freedom protected by the Fourth Amendment is the "protection of the privacy of the individual, his right to be let alone; . . ." *Davis v. United States*, 328 U.S. 582, 587 (1946). As emphasized by this Court in *Almeida-Sanchez, supra*, at 274, Fourth Amendment rights " 'are not mere second class rights but belong in the catalogue of indispensable freedoms.' " (Quoting *Brinegar v. United States*, 338 U.S. 160, 180 (1949) (Jackson, J., dissenting))

2) An individual's liberty of positioning, that is the right to decide to remain or go elsewhere.

A person whose vehicle is stopped by law enforcement officers and whose freedom to drive away is restrained is as effectively seized as the pedestrian who is detained. *Terry v. Ohio*, 392 U.S. 1, 16, 19 n. 16 (1968). Unlike the fact situation in *Terry v. Ohio, supra*, or *Adams v. Williams*, 407 U.S. 143 (1972), which involved detentions of stationary individuals on the street, the stop, interrogation, and search procedure at a checkpoint invades the right of the citizenry to decide for themselves where and when they shall travel.

[22] *See* Note, *Non-Arrest Automobile Stops: Unconstitutional Seizures of the Person*, 25 *Stan.L.Rev.* 865, 875-878 (June 1973) where the privacy interests articulated here are discussed in the context of general automobile stops by peace officers.

The Fourth Amendment protects this "right of personal security against arbitrary intrusions . . . [and] if times have changed, reducing *every man's scope to do as he pleases* in an urban and industrial world, the changes have made the values served by the Fourth Amendment more, not less, important." *Coolidge v. New Hampshire*, 403 U.S. 443, 455 (1971) (Emphasis added).

3) An individual has a liberty of movement, that is, free passage without interruption.

This significant freedom, found violated in *Almeida-Sanchez*, is abridged in the same manner by the stop and search procedure in respondent's case. Freedom of movement has been repeatedly recognized and protected by this Court. *Carroll v. United States*, 267 U.S. 132, 153-154 (1925); *Brinegar v. United States*, 338 U.S. 160, 177 (1949); *Henry v. United States*, 361 U.S. 98, 103 (1959); *Almeida-Sanchez, supra* at 274-275.

4) An individual has a Fourth Amendment interest in avoiding those whom he does not wish to encounter.

Part of the individual's "right to be let alone" certainly includes a right to be free from arbitrary confrontations with law enforcement officers which involve interrogation and search of one's automobile. This Court recognizes that if permitted such "[i]nvestigatory seizures would subject unlimited numbers of innocent persons to the harrassment and ignominy incident to involuntary detention. Nothing is more clear than that the Fourth Amendment was meant to prevent wholesale intrusions upon the personal security of our citizenry, . . ." *Davis v. Mississippi*, 394 U.S. 721, 726 (1969).

5) The occupant of a moving automobile has a privacy interest to be free from a stop and visual

inspection of the car interior by a Border Patrol officer at a checkpoint.

The primary object of the Fourth Amendment is the protection of privacy. *Katz v. United States*, 389 U.S. 347, 350 (1967). This Court has recognized that "the interior of an automobile has Fourth Amendment protection; the exercise of a desire to be mobile does not, of course, waive one's right to be free from unreasonable governmental intrusion." *Cardwell v. Lewis*, 417 U.S. 583, 591 (1974). The combined factors of a vehicle's enclosed nature and rapid movement on a freeway affords the occupant greater expectations of privacy than if the vehicle is stationary as in *Cardwell v. Lewis, supra*, or if the individual is a pedestrian on a sidewalk. *Terry v. Ohio, supra.* Privacy expectations of a moving vehicle include not only the interior, but also the areas under the hood and trunk. These expectations are violated when a Border Patrolman, without the least objective reason to suspect occupants of a vehicle to be aliens, orders the car off the highway for an interrogation of the passengers and search of the vehicle.

All five of the above Fourth Amendment privacy interests of the traveling public are violated when, as in respondent's case at San Clemente, one's car is ordered off an interstate freeway for an interrogation of the occupants and search of the trunk. If the Border Patrol officers are to have the right to interfere with the Fourth Amendment rights of a nation of motorists, that right must be conditioned upon compliance with the probable cause and warrant requirements of the Fourth Amendment. Fourth Amendment protection "reaches all alike, whether accused of crime or not." *Weeks v.*

United States, 232 U.S. 383, 392 (1914). It is no justification for this conduct that the intrusions are "modest." (Brief for Pet. 27) Mr. Justice Bradley's admonition in *Boyd v. United States*, 116 U.S. 616, 635 (1886), and repeated in *Coolidge v. New Hampshire*, *supra* at 454, is worthy of repetition here:

> "It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of that right, as if it consisted more in sound than in substance. It is the duty of the courts to be watchful for the constitutional rights of the citizen, and any stealthy encroachments thereon."

The San Clemente checkpoint exhibits all of the abuses and shortcomings which irritated the colonists and continue to irritate many people today. As one commentator recently noted, arbitrary automobile stops involve:

> "... an invasion of a motorist's protective privacy which involves, as it must, the prying eyes of uniformed authority. It is an invasion of personal security involving a seizure and temporary detention. It is an investigative intrusion aimed at the discovery of a criminal violation. Finally, it is a thoroughly arbitrary intrusion without judicial supervision before or after the fact." Note, *Automobile Spot Checks and the Fourth Amendment*, 6 *Rutgers-Camden L.J.* 85, 111 (Summer 1974).

3. The Criminal-Administrative Nature of the San Clemente Checkpoint, where the Focus is to Apprehend Illegal Aliens of a Certain Race, Requires that an Evidentiary Basis exist for the Stop and Search of Each Vehicle to Avoid Abuse.

If this Court agrees with the respondent that traditional notions of probable cause apply with respect to warrantless Border Patrol checkpoint searches as well as roving searches, the high potential for abuse during such activity will be mitigated. Immigration inspection stops, which are warrantless and allow agents unbridled discretion in selecting their targets for the more intrusive interrogation and vehicle search, provide opportunities for abuse. This Court has held that the potential for abuse is a significant factor in evaluating privacy invasions. *Davis v. Mississippi*, 394 U.S. 721, 727 (1969). As Professor Greenberg has recently pointed out:

> "Harrassment is not confined to inspections motivated solely by personal spite and bad faith, but includes overzealous enforcement. The latter problem is considerably more acute . . . [where] one of the main aims of the inspection scheme is to serve as a credible deterrent. Government use of the search power to deter, unchecked by neutral inquiry into the necessity for a given level of deterrence, creates the possibility of substantial abuse, since it is undeniable that the greater the governmental abuse, the greater the deterrent effect." Greenberg, *The Balance of Interest Theory and the Fourth Amendment: A Selective Analysis of Supreme Court Action Since Camara and See*, 61 *Cal. L. Rev.* 962, 1023 (1973).

At the San Clemente checkpoint on Interstate 5, an entire traveling public of over ten million cars per year is subjected to privacy invasions, although not all of the drivers and occupants are subjected to the same degree of intrusion. The unequal treatment at the checkpoint, not based on an articulated evidentiary foundation of reasonable suspicion of illegal conduct, leaves the decision of whom to subject to interrogation and search completely within the discretion of the Border Patrolmen who may exercise that discretion for other than proper reasons.

The most obvious potential for abuse at permanent checkpoints such as at San Clemente is the invidious discrimination against the millions of individuals of Latin American descent traveling on the highway. Much of the traffic through the checkpoint involves recently immigrated Mexicans returning from visits to relatives in Mexico to their Los Angeles homes. (B. Tr. 155) The Imperial Valley, located in the Southern District of California, is approximately 52% Mexican-American. (B. Tr. 346) The Ninth Circuit has taken judicial notice "that there is a large Mexican American population in the Oceanside area. . . . [and] it is impossible to determine from looking at a person of Mexican descent whether he is an American citizen, a Mexican national with proper entry papers, or a Mexican alien without papers." *United States v. Mallides*, 473 F.2d 859, 860 (9th Cir. 1973).[23] Oceanside is just 18 miles to the

[23] *See also United States v. Camacho-Davalos*, 468 F.2d 1382, 1383 (9th Cir. 1972) (border patrol agent's description of occupants of a truck as Mexican appearing Spanish-speaking and without immigration documents "fits thousands of American citizens").

south of the San Clemente checkpoint on Interstate 5. The major cities in Southern California contain huge populations of persons validly residing in the United States who happen to be of Latin American ancestry. Indeed, Los Angeles, California has "the largest Mexican population of any city on the continent, with the exception of Mexico City itself." *Fernandez v. United States*, 321 F.2d 283, 286 (9th Cir. 1963).

The focus of search at the San Clemente checkpoint is on illegal aliens from Mexico. In fiscal year 1973, the Immigration and Naturalization Service reports that 480,588 of the 498,123 deportable aliens apprehended by the Border Patrol were from Mexico. In the Chula Vista Sector, 126,206 of the 128,889 deportable aliens located were from Mexico which constitutes 98% of all illegal alien entrants apprehended. Adding apprehensions from the other Latin American countries, the figure becomes 99%.[24] When virtually every deportable alien located at the San Clemente checkpoint is of apparent Latin American extraction, it is difficult to accept the Service's position that race or skin color are not determinate factors in deciding whether or not to refer a vehicle off Interstate 5 for an interrogation and

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[24]These figures may be found in a statistical breakdown of deportable aliens located by nationality in fiscal year 1973 provided by the U.S. Department of Justice, Immigration & Naturalization Service to the Judiciary Committee of the House of Representatives. *Hearings Before the Subcommittee on Immigration, Citizenship, and International Law of the Committee on the Judiciary, House of Representatives*, 93rd Cong. 1st Sess., p. 125 (20 September 1973).

search.[25] The apprehensions of aliens of Latin American descent at the checkpoint refute this contention.

With a substantial traveling public of lawfully-admitted Latin American residents and citizens passing through the checkpoint, it is apparent that referrals to the secondary area for interrogation and search are based upon skin color. This constitutes an invidious discrimination and a denial of equal protection of the laws to a minority population.

The selection of a vehicle for interrogation and search based upon the arbitrary and unjustified standard of race is as violative of equal protection and due process as the discrimination against race in licensing in *Yick Wo v. Hopkins*, 118 U.S. 356 (1886); the discrimination against race in the study of law in *Gaines v. Canada*, 305 U.S. 337 (1938); the discrimination against race in jury service in *Hernandez v. Texas*, 347

[25] At the *Baca* hearing, Acting Commissioner Greene testified that race or skin color was not necessarily the key criteria used by the point officer in referring occupants and their vehicles to secondary. (B. Tr. 75) Rather, the so-called "break-in-the-pattern of traffic" is alleged to be the basis upon which a point officer refers vehicles to secondary for interrogation and search. (B. Tr. 292) When asked to define that phrase, the response of Agent Batchelor was that "we have reason to believe that the occupants of that particular vehicle are indeed aliens who are in the United States illegally." (B. Tr. 293) The "break-in-the-pattern" thus means that the point officer by visually inspecting the occupants of the vehicle is of the belief that illegal aliens are in the vehicle. Since almost all of the illegal aliens apprehended in the area of the San Clemente checkpoint are of Latin American descent, it is difficult to believe that the skin color and facial features of the occupants are not the key criteria used by the point officer in referring vehicles to secondary for how else is the "determination" to be made that illegal aliens are in the vehicle simply based on a visual inspection?

U.S. 475 (1954); the discrimination against race and segregated school attendance in *Bolling v. Sharpe*, 347 U.S. 497 (1954); or the discrimination against race in miscegenation laws in *Loving v. Virginia*, 388 U.S. 1 (1967).

In this context, it is essential that the Border Patrol be required to have an articulated evidentiary basis to support any stop, interrogation of persons and search of a vehicle at a checkpoint. At present, there are no statutory or administrative regulations stating criteria for referrals to secondary for interrogation and a warrantless search. (B. Tr. 65, 201-202, 208, 380-381) The point officer has complete discretion to refer any particular vehicle to secondary. With deportable Mexican aliens the object of the search, such arbitrary referrals to secondary may be "a major source of friction between the police and minority groups." *Terry v. Ohio*, 392 U.S. 1, 14 n. 11 (1968), quoting the *President's Commission on Law Enforcement and Administration of Justice, Task Force Report: The Police* 183 (1967).[26] These sensitive considerations have led virtually every commentator to agree with this Court's holding in *Almeida-Sanchez* that at least probable cause (and perhaps a warrant) must exist to support the stop and search of vehicles for aliens. *See* Note, *Fourth Amendment Applications to Searches Conducted by Immigration Officials*, 38 *Albany L. Rev.* 962, 975 (1974); Note, *The Aftermath of Almeida-Sanchez v. United States: Automobile Searches for*

[26] "The hatred and fear of the police, whether overt or hidden, felt by many Negroes, Puerto Ricans and Mexican-Americans cannot be overstated." *American Civil Liberties Union, Police Power and Citizens' Rights* 11 (1967). *See also, e.g., National Advisory Commission on Civil Disorders, Report* 93 (1968).

Aliens Take on a New Look, 10 *Cal.WestL.Rev.* 657, 672 (Spring 1974); Tribe, *The Supreme Court: 1972 Term*, 87 *Harv.L.Rev.* 1, 204 (1973); Comment, 27 *Vand.L.Rev.* 523 (1974); Comment, 7 *Vand.Jour.of Transnational Law* 762, (1974); Note, *Automobile License Checks and the Fourth Amendment*, 60 *Va.L.Rev.* 666, 668-689, n. 107 (1974). Similar considerations have caused the drafters of the *Model Code of Pre-Arraignment Procedure*[27] and other commentators[28] to require an evidentiary basis for automobile stops and searches. The reporters for the *Model Code* stress that:

> "There are two different sorts of costs associated with the stop. First, there is the imposition upon innocent persons even when the police stay within the terms of the authority granted. Such imposition is an evil in itself, and may lead as well to the further evil of resentment against the police and civil authority in general. Second, there is the danger that the stop is susceptible to abuse. It may

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[27] *Model Code of Pre-Arraignment Procedure* Section 110.2(2) (Official Draft No. 1, 1972). The *Model Code* would only suspend the reasonable suspicion requirement for stops at roadblocks during emergency situations.

[28] Note, *Inspections by Administrative Agencies: Clarification of the Warrant Requirement*, 49 *Notre Dame Lawyer* 879 (Apr. 1974); Note, *Automobile Spot Checks and the Fourth Amendment, Rutgers-Camden L. Jour.* 85 (Summer 1974); Note, *Non-Arrest Automobile Stops: Unconstitutional Seizures of the Person*, 25 *Stan. L. Rev.* 865 (June 1973); Comment, *Interference with the Right to Free Movement: Stopping and Search of Vehicles*, 51 *Cal. L. Rev.* 907 (1963); Greenberg, *The Balance of Interest Theory and the Fourth Amendment: A Selective Analysis of Supreme Court Action Since Camara and See*, 61 *Cal. L. Rev.* 62 (1973).

be used not for its authorized purpose but to harass persons to whom the police may be hostile or about whom they feel a generalized suspicion or apprehension—e.g. youths, unconventionally attired persons, Negroes in white area, whites in Negro areas. And the stop and frisk carry the special potential that they may be used to circumvent constitutional restrictions on search and seizure by providing a pretext to search for narcotics and gambling slips. The danger of abuse is argued to be particularly serious, since the stop must be predicated on a more permissive standard than arrest thus making it more difficult to confine the authority to proper cases and to ascertain after the fact whether an abuse has indeed taken place."[29]

II.

ADVANCE JUDICIAL APPROVAL EVIDENCED BY A WARRANT UPON A SHOWING OF PROBABLE CAUSE FOR THE OPERATION OF AN IMMIGRATION CHECKPOINT IS THE ONLY CONSTITUTIONAL PROCEDURE AUTHORIZING STOPS AND SEARCHES OF VEHICLES BY THE UNITED STATES BORDER PATROL.

In *Almeida-Sanchez*, this Court held that probable cause, as traditionally defined, is a constitutionally sufficient basis for an automobile search for aliens absent even a warrant. However, if the functional equivalent of probable cause concept is to be deemed a constitutionally adequate predicate for a vehicle search for aliens, the determination of functional equivalency is

[29] Note 27 *supra* at § 110.2, Comment 4(b).

one for a judicial officer and conventional warrant procedure. This section of the brief analyzes the warrant requirement assuming such a showing of equivalency.

A. The Fourth Amendment Requirement That Searches Be Authorized by a Warrant Issued Upon a Showing of Probable Cause Applies to Searches Conducted at Roving, Temporary, and fixed Immigration Checkpoints.

In *United States v. United States District Court*, 407 U.S. 297 (1972), this Court speaking through Justice Powell stated:

> "The Fourth Amendment contemplates a prior judicial judgment, not the risk that executive discretion may be reasonably exercised. This judicial role accords with our basic constitutional doctrine that individual freedoms will be preserved through a separation of powers and division of function among the different branches and levels of Government. . . . prior review by a neutral and detached magistrate is the time-tested means of effectuating Fourth Amendment rights." (At 317-318)

Only Justice Powell spoke to the warrant issue in the context of immigration searches conducted by roving Border Patrolmen in *Almeida-Sanchez*, 413 U.S. 275-285. After discussing the issue of probable cause to conduct such searches, Justice Powell turned to the issue of "whether the burden of obtaining a warrant is likely to frustrate the governmental purpose behind the search. *Camara v. Municipal Court*, 387 U.S. 523, 533

(1967)." (*Id.* at 282) In finding that obtaining a warrant to conduct such searches in areas near the border would not frustrate the governmental purpose behind the searches, Justice Powell recognized that "the judicial function here would necessarily include passing on just such a basic [agency] decision." 413 U.S. 283.

> "Nothing in the papers before us demonstrates that it would not be feasible for the Border Patrol to obtain advance judicial approval of the decision to conduct roving searches on a particular road or roads for a reasonable period of time." 413 U.S. at 283.
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> * * *
>
> "There is no reason why a judicial officer could not approve where appropriate a series of roving searches over the course of several days or weeks. Experience with an initial search or series of searches would be highly relevant in considering applications for renewal of a warrant." 413 U.S. at 283, n. 3.

The government argues that while it has no disagreement with the concept of search warrants issuing to authorize roving Border Patrol searches in areas near the border, it believes there are "significant differences between a roving patrol or 'area search operation' . . . on the one hand and a fixed checkpoint operation on the other hand, and that those differences should lead to different results on the question of the need for a warrant." (Brief for Pet. 34)

However, the Fifth, Ninth, and Tenth Circuits, the courts which deal with immigration cases on a daily basis, have all agreed that the ruling of *Almeida-Sanchez* is applicable to fixed checkpoint searches as well as roving patrol searches. As the Fifth and Ninth Circuits have

noted, "the distinction between a checkpoint and a roving patrol is not important." *United States v. Speed,* 489 F.2d 478, 480 (5th Cir. 1973); *rehearing opinion,* 497 F.2d 546 (1974); *United States v. Bowen,* 500 F.2d 960, 967 (9th Cir. *en banc* 1974). The Tenth Circuit agrees that ". . . a search at a fixed checkpoint of an automobile for aliens without a warrant and without probable cause, 98 miles away from the external boundary, is unlawful, unless the particular fixed checkpoint be in fact a functional equivalent of a border search." *United States v. King,* 485 F.2d 353, 359 (10th Cir. 1973); *see also United States v. Maddox,* 485 F.2d 361 (10th Cir. 1973). In short, these circuits agree that there are no facts of constitutional dimension which distinguish roving and permanent checkpoint searches. A rational search warrant procedure is at least as feasible with fixed checkpoints as with roving. Similar questions involving the important balancing of legitimate interests of law enforcement with the citizenry's protected Fourth Amendment rights are involved. The permanent checkpoint stops and searches present the type of delicate question of constitutional judgment which ought to be resolved by the Judiciary rather than the Executive. As noted in *Camara, supra*:

> "This is precisely the discretion to invade private property which we have consistently circumscribed by a requirement that a disinterested party warrant the need to search." 387 U.S. 532-533.

B. The Absence of Statutory or Regulatory Guidelines Limiting the Discretion of the Border Patrol in Selecting Target Vehicles for Search Requires the Protection of a Warrant.

The warrant requirement of *Camara* may not be jettisoned as petitioner argues. Warrants may be dispensed with in the purely administrative inspection area only if two conditions are met:[30] 1) the authorizing statute must be specific and contain standards limiting the time, place, and scope of the inspections; and 2) the scheme of regulation is so pervasive that those subject to inspection will have been put on notice by their own familiarity with the statutes and the frequency of visits by the inspector. If these two conditions are met, the purposes of a warrant as described in *Camara* (judicial preview of police-citizen contacts, notice of the need, scope, and authority of the inspector) are satisfied. In the case of Border Patrol inspections at checkpoints, neither of the above two conditions are met. There is no authorizing statute containing precise standards limiting the time, place, and scope of inspections. *See* 8 U.S.C. §1357(a)(3); 8 C.F.R. 287.1. Nor is the scheme of regulation so pervasive that those subject to inspection (i.e. the traveling public between San Diego and Los Angeles on Interstate 5) are put on notice by their familiarity with the statutory scheme and the frequency of inspection. In fact, the Border Patrol itself concedes that much of

[30] *See* Note, "*Inspections by Administrative Agencies: Clarifications of the Warrant Requirement,*" 49 *Notre Dame Lawyer* 879 (April 1974) which discusses in detail the arguments in this section.

the traveling public is unaware of Southern California's functioning permanent checkpoints. (B. Tr. 281) As stated in *Colonnade, supra,* "When Congress has authorized inspection but made no rules governing the procedure that inspectors must follow, the Fourth Amendment and its various restrictive rules apply." 397 U.S. 72-77. If there is a unity to this Court's pronouncements in the area of administrative inspections, it is that absent a specific statute of authorization particularly describing the functions of the inspectors, a warrant will be required to conduct the inspection.

C. Because Millions of Citizens Come Into Contact with Law Enforcement Officers at the San Clemente Checkpoint Each Year, the Need for a Warrant Procedure is More Important in This Context than with Roving Stops and Searches.

The important factors which distinguish permanent checkpoints from roving patrols are those which make plain the necessity for a warrant procedure prior to conducting searches at a permanent checkpoint. Unlike a roving patrol which involves only a few subjects in the stop and search procedure, the establishment of a permanent checkpoint such as at San Clemente involves an intrusion on an entire traveling public. The Border Patrol estimates that in excess of ten million vehicles traverse through the San Clemente checkpoint each year. With so many citizens coming within the ambit of the checkpoint, the need for a warrant procedure is paramount. This is especially true where much of the traveling public in Southern California does not

anticipate a permanent roadblock located on an interstate freeway between San Diego and Los Angeles. (B. Tr. 281) Further, the Border Patrol recognizes that at permanent checkpoints: "So many law-abiding citizens must be contacted to discover those who are violators . . ."[31] that great care must be taken in its operation.

Petitioner asserts that with respect to permanent checkpoints, a warrant procedure cannot effectively protect Fourth Amendment rights. However, a recent government brief before the Ninth Circuit defends the use of area warrants at the San Clemente checkpoint because it protects Fourth Amendment rights by:

> "1) Insuring that the statute and regulations relied upon do allow the operations at all;
>
> 2) Establishing that the procedures employed are reasonable, being as close to the border as practicable and providing a minimal level of intrusion to the innocent traveling public;
>
> 3) Dictating that the actual inspection technique used be as limited as possible . . . .
>
> 4) Limiting the time span of the warrant to ten days to allow the judicial branch to review the evidence presented to insure that the justification for the operation has apparently resulted in the Border Patrol being even more careful of the vehicles that they refer to secondary at the checkpoint."[32]

In addition to those reasons enumerated above, a warrant further protects Fourth Amendment interests at checkpoints by:

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[31] Government Exhibit 43, 9-20.

[32] Government's brief in *Martinez-Fuerte*, note 4, at 43-44.

5) apprising the subject of a stop, interrogation, and search that the Border Patrol officer is acting pursuant to lawful authority because often the traveling public is unaware and does not expect to be confronted with a roadblock on an interstate freeway within the interior of California. (B. Tr. 281) A warrant serves a meaningful function by evidencing the authority to operate such a checkpoint operation and prescribing in writing the lawful limits of the inspector's power to stop, interrogate, and search.

6) As with roving patrol stops and searches, the point officer at a fixed checkpoint has complete authority to select which vehicles passing through the checkpoint will be subject to the more intrusive interrogation or search than that conducted at the primary stop. As stated in *United States v. Bowen*, 500 F.2d 960, 964 (9th Cir. *en banc* 1974): "Since not all vehicles passing through a checkpoint are stopped, and since not all vehicles stopped are searched, the officer at the checkpoint still retains a good deal of discretion to 'single out' some travelers for stops or intrusive searches." A warrant authorizing the functioning of a Border Patrol checkpoint could serve the important function of delineating with specificity those criteria upon which a Border Patrolman may act in directing vehicles off the highway into a secondary area for interrogation and search.

7) A warrant will instruct the Border Patrol officer regarding the time, scope, and intensity of any interrogation of persons and search of a vehicle.

8) The operation of a permanent checkpoint may constitute a hazard to traffic during times of inclement weather, a lack of manpower or when the flow of traffic becomes heavy. Instructions

introduced into the warrant may mandate checkpoint closure when such conditions pose a hazard to the general traveling public.

9) Permanent checkpoints on major interstate highways involve the stopping of commuter traffic, tourist traffic, business traffic, and public transportation. A warrant would be utilized to insure that public forms of transportation such as buses[33] not be stopped and each passenger interrogated as to citizenship when the driver indicates that the bus originates from a non-border city.

10) A final reason for the intervention of a warrant procedure is the ephemeral nature of permanent and temporary checkpoints. Not only is there some dispute as to the length of time a checkpoint stays open, but the Service apparently is not clear where all of them are located. Petitioner has supplied this Court with two maps indicating the location of Border Patrol checkpoints throughout the Southwestern United States. (Brief for Pet. 24, n. 11) It may be misleading to examine these maps without understanding that none operate all of the time. *Baca* revealed that the three checkpoints in the Chula Vista Sector were open the following percentages of time: San Clemente (70%); Temecula (80%); Oak Grove (20%) (B.Tr. 250-251). The government exhibits also reflect a temporary Border Patrol checkpoint approximately two miles north of Tecate, California, at the junction of Telegraph Road and S-94 (Map No. 1, checkpoint 4; Map No. 2, checkpoint 6). Agent Richard Batchelor, Deputy Chief Patrol Agent of the Chula Vista

[33]The inspection of a bus at a permanent checkpoint involves an armed officer actually entering the bus and inspecting all passengers. (B. Tr. 187); *see also* Government Exhibit 43, 9-16.

Sector, testified that the three previously mentioned checkpoints are the *only* checkpoints in his sector. (B.Tr. 144, 148-149); see *Baca, supra*, 368 F.Supp. 410-412. Counsel for respondent, who have some familiarity with this geographic area, are unaware of any such checkpoint.

In the El Centro Sector, there are nine such checkpoints. *Id.* at 416-418. Yet petitioner's Map No. 1 has eight checkpoints marked in this area, three of which were not mentioned in the *Baca* hearings perhaps due to the fact that they are California Agricultural Inspection Stations on the Arizona-California border. Four checkpoints noted in *Baca* are not on Map No. 1. Map No. 2 has only five checkpoints for the El Centro Sector. Wherever these checkpoints are in fact located and whatever their number, the point is that none are open for more than about half the year. For example, three checkpoints reflect the following percentages of time open: S-86 (65%); S-78 (25%); S-22 (50%). Several are open only a few hours each year. *Id.* at 418. The fate of the California Agricultural Inspection Stations at Winterhaven, Blythe, and Vidal Junction is not within the scope of the issues in this case and should not be considered immigration checkpoints as the petitioner suggests.[34]

[34]The petitioner's maps and brief unnecessarily imply that an affirmance in this case will have an adverse affect on all other checkpoints. There is no record for such an inference since some checkpoints are valid as functional equivalents of the border (*e.g.*, Map 1, No. 40, *United States v. Byrd*, 483 F.2d 1196, 1199, n. 7 (5th Cir. 1973); or because they only operate when specific information exists that smuggling vehicles are headed toward a checkpoint (*e.g.*, Map 1, No. 8, *Baca, supra* at 418); or when operated pursuant to a valid warrant. Where, however, a checkpoint has no nexus to the border and stops and searches

Given the differences of checkpoint location and existence between petitioner's Map 1 and 2 and the *Baca* opinion, a warrant procedure would guarantee the traveling public a degree of certainty as to where and when checkpoints are established. The fact that several checkpoints are open only a few hours each year and others only several days is a powerful argument for having a neutral magistrate authorize initiation of such activity rather than law enforcement officers "engaged in the often competitive enterprise of ferreting out crime." *Johnson v. United States*, 333 U.S. 10, 14 (1948).

Finally, the best response to petitioner's argument that a warrant procedure cannot be applied to the checkpoints is that such warrants are currently issued in various federal districts throughout the southwestern United States. With respect to the San Clemente checkpoint, warrants have been issued continuously since 22 June 1974 authorizing its operation.[35] If the

are made without a suspicion of the illegal status of the occupants, it operates in violation of the Fourth Amendment. As the Fifth Circuit recently stated in *United States v. Speed*, 497 F.2d 546, 548 (1974);

> "The government cannot fulfill its burden of demonstrating a nexus with the border merely by showing that many violations occur in the vicinity of the search. As this court held more than a year before *Almeida-Sanchez*, 'proximity to the frontier does not automatically place a 100-mile strip of citizenry within a deconstitutionalized zone, with its attendant de-escalation of Fourth Amendment requirements. [citation omitted].'"

[35]The government contends that these warrants only authorize stopping the vehicles for purposes of inquiry. (Brief for Pet. 41, n. 21) The warrants issued from 22 June to 11 July 1974 all included provisions authorizing the inspection of the vehicle according to the Brief for the United States in *Martinez-Fuerte, supra*, note 4 at 43.

government found such warrants to frustrate the purpose of the checkpoint, it would not seek their issuance and repeated reissuance. The government's actions (in continuously seeking and obtaining area inspection warrants for permanent checkpoints) speak louder than words (Brief for Pet. 33-43).

One of the more disturbing arguments suggested by petitioner is that the Fourth Amendment rights of the citizenry violated by warrantless, causeless searches at checkpoints may be adequately protected at post-intrusion motion to suppress hearings. (Brief for Pet. 34) However, the millions of innocent citizens who come into contact with the checkpoints each year have no realistic forum available to contest warrantless, causeless, arbitrary stops, interrogations, and searches at permanent checkpoints.[36] To adopt the suggestion of

[36]The idea of civil suits initiated by the wronged citizenry is not only impracticable, but unrealistic:

> "Where are the lawyers going to come from to handle these [civil suit] cases for the plaintiffs? *Gideon v. Wainwright* [372 U.S. 335 (1963)] and its progeny conscript them to file suppression motions; but what on earth would possess a lawyer to file a claim for damages before the special tribunal in an ordinary search-and-seizure case? The prospect of a share in the substantial damages to be expected? The chance to earn a reputation as a police-hating lawyer, so that he can no longer count on straight testimony concerning the length of skid marks in his personal injury cases?
>
> Police cases are an unadulterated investigative and litigative nightmare. Taking on the police in any tribunal involves a commitment to the most frustrating and thankless legal work I know. And the idea that an unrepresented, inarticulate, prosecution-vulnerable citizen can make a case against a team of professional investigators and testifiers in any tribunal beggars belief. Even in a tribunal having recognized responsibilities and some re-

the petitioner would effectively turn the Fourth Amendment on its head by permitting only those charged with crimes a forum to litigate. The thrust of the warrant requirement of the Fourth Amendment is that *prior* to the contemplated intrusion by governmental agents, a neutral and detached judicial officer shall evaluate the reasonableness of the information and the contemplated intrusion. *Ex post facto* review effectively wipes out the two distinct constitutional protections served by the warrant requirement: 1) to eliminate altogether searches not based on probable cause and 2) that those searches deemed necessary be as limited as possible by requiring a particular description of the persons and items to be seized. *Coolidge v. New Hampshire*, 403 U.S. 443, 467 (1971).

Warrantless permanent checkpoint operations involve precisely the same evils that were condemned as unconstitutional in *Almeida-Sanchez*. The need for prior judicial authorization by warrant is more important for permanent checkpoints than roving checks because of the millions of persons coming within the ambit of checkpoint operations where no regularized procedure exists to determine whom shall be searched. (*Cf.* Brief for Pet. 35) Contrary to the assertions of petitioner, a

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sources to conduct independent investigation, a plaintiff without assiduous counsel devoted to developing his side of the case would be utterly outmastered by the police." Amsterdam, *Perspectives on the Fourth Amendment*, 58 *Minn. L.R.* 349, 430 (Jan. 1974).

warrant procedure is now in effect in the Southern District of California. (Brief for Pet. 38)[37] The judicial and administrative resources expended to issue these warrants, which the petitioner contends is unjustified (*id.*) are exactly the efforts contemplated of law enforcement officers and the judiciary by the Fourth Amendment:

> "Without disrespect to the state law enforcement agent here involved, the whole point of the basic rule so well expressed by Mr. Justice Jackson [requiring judicially authorized warrants] is that prosecutors and policemen simply cannot be asked to maintain the requisite neutrality with regard to their own investigations—the 'competitive enterprise' that must rightly engage their single-minded attention *Cf. Mancusi v. DeForte*, 392 U.S. 364, 371." *Coolidge v. New Hampshire*, 403 U.S. 443, 450 (1971).

[37]The petitioner asserts that the judges of the Southern District of California have reached conflicting decisions concerning the lawfulness of checkpoint stops issued pursuant to area-type warrants. (Brief for Pet. 41) However, the issues in those cases involved not only the propriety of the warrant, but also the establishment of probable cause (or its functional equivalent) to justify its issuance. Thus, it is misleading to state that warrants are being denied because of the existing uncertainties concerning their lawfulness under the Fourth Amendment. (Brief for Pet. 41) The issues with which the judges of the Southern District of California have grappled concerned not only the type of warrant to be issued, but whether or not the government had demonstrated probable cause or its equivalent to justify its issuance. Utilizing the government's own statistics supplied in affidavits and returns in the San Clemente checkpoint warrant in *United States v. Martinez-Fuerte, supra,* note 4, the district court judges were no doubt struck with the fact that 99.9% of the traffic passing through the San Clemente checkpoint does not contain immigration law violators. San Clemente is simply not the place to have a checkpoint, warrant or no warrant.

III.

PROBABLE CAUSE HAVING ALWAYS BEEN REQUIRED FOR SEARCHES OF AUTOMOBILES, A FORTIORI THE EXCLUSIONARY RULE MUST BE APPLIED TO CAUSELESS CHECKPOINT AUTOMOBILE SEARCHES FOR ALIENS CONDUCTED AFTER ALMEIDA-SANCHEZ.

A. The Rule Announced in *Almeida-Sanchez* was not a New Application of the Evidentiary Exclusionary Rule.

1. Supreme Court precedent has continuously maintained a requirement of probable cause for a vehicle search.

Sixty years ago this Court established the exclusionary rule to deny to the Federal Government and its agencies the fruits of unlawful searches in federal criminal proceedings. *Weeks v. United States*, 232 U.S. 383 (1914). Fifty years ago, this Court recognized that exigent circumstances involving moving vehicles might excuse the warrant requirement, but re-affirmed the application of the probable cause requirement to stops and searches of automobiles on a highway. *Carroll v. United States*, 267 U.S. 132 (1925).

Since *Carroll*, there is an unbroken chain of precedent holding that as a minimal constitutional requirement probable cause is required for a stop and

search of an automobile.[38] After *Almeida-Sanchez*, the requirement of probable cause for a vehicle search remains unaltered.

2. The requirement of probable cause as a prerequisite to automobile searches for aliens did not establish a new rule.

In Part II of *Bowen v. United States*, 500 F.2d 960, 975 (9th Cir. 1974), Judge Wallace's approach, although not his conclusion, frames the question before this Court: whether the decision in *Almeida-Sanchez* establishes a new rule for retroactivity analysis. The

[38] *Husty v. United States*, 282 U.S. 694, 695 (1931); *Scher v. United States*, 305 U.S. 251 (1938); *United States v. DiRe*, 332 U.S. 581, 584-587 (1948); *Brinegar v. United States*, 338 U.S. 160, 177 (1949) ("This does not mean, as seems to be assumed, that every traveler along public highways may be stopped and searched at the officers' whim, caprice, or mere suspicion"); *Preston v. United States*, 376 U.S. 364 (1964); *Dyke v. Taylor Implement Mfg. Co.*, 391 U.S. 216, 221 (1968) ("The cases so holding have, however, always insisted that the officers conducting the search have 'reasonable or probable cause' to believe that they will find the instrumentality of a crime before they begin their warrantless search"); *Chambers v. Maroney*, 399 U.S. 42, 48 (1970) ("After surveying the law from the time of the adoption of the Fourth Amendment onward, the Court held that automobiles and other conveyances may be searched without a warrant in circumstances that would not justify the search without a warrant of a house or an office, provided that there is probable cause to believe that the car contains articles that the officers are entitled to seize"); *Coolidge v. New Hampshire*, 403 U.S. 443, 458-464 (1971); *Cady v. Dombrowski*, 413 U.S. 433 (1973) (Automobiles are "effects" within Fourth Amendment).

petitioner (Brief for Pet. 47 n. 25), the Court of Appeals in *Bowen* (500 F.2d 960, 975) and respondent agree that the dissenting opinion of Justice Stewart in *Milton v. Wainwright*, 407 U.S. 371, 381-382 n. 2 (1972), formulates the correct test for determining if a new rule was announced in *Almeida-Sanchez*: "An issue of the 'retroactivity' of a decision of this Court is not even presented unless the decision in question marks a sharp break in the web of the law. The issue is presented only when the decision overrules clear past precedent [citations omitted]; or disrupts a practice long accepted and widely relied upon [citations omitted]."

Respondent also agrees with the application of the test in *Milton v. Wainwright*. There, the Court[39] recognized that counselless police interrogation of a suspect after indictment, formally condemned in *Massiah v. United States*, 377 U.S. 201 (1964), was not a marked departure in the law but the natural result of the rule announced in *Powell v. Alabama*, 287 U.S. 45 (1932). Respondent submits that the application of the *Carroll* case to checkpoints is analogous to *Milton*. The web of the law requiring probable cause for vehicle searches was formulated in *Carroll* and continued to the present day. In the face of this clear constitutional rule, the Border Patrol attempted to fashion its own exception which this Court struck down in *Almeida-Sanchez*.

Almeida-Sanchez did not overrule clear past precedent of this Court. "No claim is made nor could one be, that the search of the petitioner's car was

[39]The majority held that any error was harmless but did not disagree with the application of the rule by the dissent.

constitutional under any previous decision of the Court involving the search of an automobile." 413 U.S. 269. Justice Powell, concurring found "none of our Fourth Amendment decisions supports the search conducted in this case." *Id.* at 275. The same analysis has led the Fifth,[40] Ninth,[41] and Tenth[42] Circuits to apply the requirement of probable cuase to immigration searches at checkpoints at least since 21 June 1973, the date of the decision in *Almeida-Sanchez.*

As recognized by the above three Circuits, *Almeida-Sanchez* was but a recognition of rules forged in *Carroll.* With *Carroll*, reliance on contrary prior Ninth Circuit opinions is misplaced; the later, inconsistent with the *Carroll* decision, cannot be treated as "clear past precedent." The clear past precedent is *Carroll.*

Almeida-Sanchez did not bring about a disruption of a practice long accepted or widely relied upon by law enforcement officers. Checkpoints existed prior to 1946, but there is no record of where they were or whether searches were conducted of vehicles. If searches

[40]In *United States v. Speed,* 497 F.2d 546 (5th Cir. 1974), a search at a temporary checkpoint *prior* to 21 June 1973 was declared unconstitutional for want of probable cause; *cf., United States v. Miller,* 492 F.2d 37 (5th Cir. 1974) (roving Border Patrol alien search of vehicle prior to *Almeida-Sanchez* upheld based on non-retroactivity analysis).

[41]*United States v. Bowen,* 500 F.2d 960 (9th Cir. *en banc* 1974).

[42] *United States v. King,* 485 F.2d 353 (10th Cir. 1973); *United States v. Maddox,* 485 F.2d 362 (10th Cir. 1973). Both cases involved checkpoint searches *before* 21 June 1973. The cases were remanded to the trial court with instructions to dismiss unless the checkpoints were functional equivalents of the border.

of vehicles were in fact conducted, the probable cause rule of *Carroll* may have been followed. All we know of this pre-1946 checkpoint activity is that it was without legal justification until the Attorney General sought and obtained legislation in 1946. During a ten-year period (1963-1973) intermediate federal courts rationalized an exception to probable cause for searches at checkpoints based on the legislation.[43] 8 U.S.C. §1357(a). Reliance was placed upon the statute and regulation, yet the courts of appeal did not squarely resolve the contradictory precedent of *Carroll*, nor could they do so. The Immigration Service has yet to recognize that often pragmatic considerations of alleged law enforcement efficiency must give way to Fourth Amendment considerations (*Cf., United States v. United States District Court*, 407 U.S. 297 (1972)) for the Service continued the operation of the checkpoints without a warrant after they were aware of the decision in *Almeida-Sanchez* (B.Tr. 213) and even after the announcement of *Bowen*.[44] This Court must not permit

[43]*See* Circuit Judge Hufstedler's dissent in *Bowen, supra* at 984 in which an analysis of Ninth Circuit decisional law revealed "that fixed checkpoint searches fared neither better nor worse than searches conducted at temporary checkpoints or by roving patrols away from the border."

[44]*E.g. United States v. Sanchez-Pedraza*, No. 74-2786, now before the Ninth Circuit after a motion to suppress was granted by district court on 19 August 1974. The case involves a causeless stop and detention at the San Clemente checkpoint on 5 June 1974 after *Bowen* and *United States v. Juarez-Rodriguez*, 498 F.2d 7 (9th Cir. 1974), clearly held that such causeless stops and detentions were illegal. The stop in *Sanchez-Pedraza* occurred while the checkpoint was operating without the authorization of a warrant.

the government to establish practices at odds with announced Supreme Court precedent and then allow the continued practice to serve as a basis for claiming exemption from that precedent. Such a bootstrap interpretation would encourage questionable law enforcement practices. This is inconsistent with the Court's practice of establishing rules requiring prudent interpretation by law enforcement officers.

Petitioner notes the requirements of the "new rule" test in *Chevron Oil Co., v. Huson*, 404 U.S. 97, 106 (1971). Brief for Pet. 53. As in *Milton*, the new principle must overrule clear past precedent upon which the parties relied or decide an issue of first impression whose resolution was not clearly foreshadowed. In *Almeida-Sanchez*, this Court did not overrule past precedent, but merely followed the probable cause rule of *Carroll*. For retroactivity analysis purposes, the probable cause rule as applied to alien searches of cars away from the border (or its functional equivalent) begins with *Weeks* and *Carroll*.

Gosa v. Mayden, 413 U.S. 665 (1973), which held the new rule in *O'Callahan v. Parker*, 395 U.S. 258 (1969) (jurisdiction of military tribunals) not to be retroactive is consistent with the above analysis because *O'Callahan* was: (1) a new constitutional rule and (2) "a clear break with the past." 413 U.S. 665, 672-673. More appropriate is the discussion in *Robinson v. Neil*, 409 U.S. 505 (1973), where the Court restated the general common law rule of retrospective effect of its constitutional decisions but limited that rule as it applied to "new constitutional interpretations" involving criminal rights. 409 U.S. 505, 507. The former jeopardy protection against both state and

municipal criminal prosecutions announced in *Waller v. Florida*, 397 U.S. 387 (1970), was given retrospective application. Although this was a new rule of law, in light of *Benton v. Maryland*, 395 U.S. 784 (1969), this Court's "decision in *Waller* cannot be said to have marked a departure from past decisions of this Court." 409 U.S. 505, 510. *Almeida-Sanchez* involved an *old rule* (probable cause to search) following established precedent (*Carroll*). Petitioner's characterization of the probable cause requirements for alien searches as a new rule because of lower court decisions to the contrary is unprecedented and simply wrong. The problems inherent in permitting courts of appeals to fashion constitutional pronouncements binding on the Supreme Court are outlined by Circuit Judge Hufstedler in her dissent in *Bowen*, 500 F.2d 960, 984-985. More important, the need for a universal standard requires the determination of new rules from a single forum binding all other courts. Logic and stability necessitate that this Court "start" and "end" constitutional principles.

Here, precedent was "started" with *Carroll*. *Almeida-Sanchez* recognized and continued the fundamental principles of probable cause to support the stopping and searching of vehicles moving on the highway. If in *Milton v. Wainwright* this Court could find that no new rule was announced by *Massiah*, then by similar reasoning the Court must recognize that the clear language of *Carroll* controls the instant case.

3. Conflicting precedent of lower courts is always subordinated to the decisions of the Supreme Court.

The Ninth Circuit recognized the operation of checkpoints in *Contreras v. United States*, 219 F.2d 63 (9th Cir. 1961) (Temecula checkpoint 72 miles north of the border; case reversed on other grounds); *Fernandez v. United States*, 321 U.S. 283 (9th Cir. 1963) (checkpoint referred to as immigration and customs checkpoint, where officer smelled marijuana emanating from the stopped vehicle); and *Barba-Reyes v. United States*, 387 U.S. 91 (9th Cir. 1967) (San Clemente again referred to as immigration and customs checkpoint; officer detected smell of marijuana after defendant opened trunk of his vehicle). In 1971, Circuit Judge Browning filed his comprehensive dissent which articulated the questionable basis of such searches finding such procedure in conflict with established constitutional principles. *United States v. Almeida-Sanchez*, 452 F.2d 459, 461-468 (9th Cir. 1971). Not only was there a conflict with earlier precedent of the Supreme Court (i.e. *Carroll*), but the judicial exception for alien searches carved from the traditional requirement of probable cause did not comport with Ninth Circuit recognition that probable cause was required for a vehicle search for contraband away from the border. 452 F.2d 459, 463-464. In the earlier decisions, the checkpoints were deemed immigration and customs checkpoints, yet a customs checkpoint was legally impermissible. The Ninth Circuit had created an exception to the generally established rule,[45]

[45]Even this exception had an exception, for the Court of Appeals limited an alien search to places in the automobile where an alien could be hidden. *Valenzuela-Garcia v. United States*, 425 F.2d 1170 (9th Cir. 1970).

but this exception initiated by the Court of Appeals did not swallow the constitutional rule or abolish it. The checkpoints existed before statutory or court recognition, but their very existence, having been created after *Carroll*, never had the requisite *imprimatur* that could negate or exempt a checkpoint from the impact of *Carroll*–another Supreme Court decision. Pragmatic considerations of the alleged usefulness of these checkpoints prompted the gamble by the Immigration Service that they would be upheld even in the face of prior precedent such as *Almeida-Sanchez*. When the government seeks an exception from established Supreme Court precedent, it should not be able to take refuge in circuit court opinions inconsistent with rules established by this Court.

4. The checkpoints were neither created in reliance upon statutory precedent nor are they sustained by such legislation.

The Immigration Service acknowledges that traffic checkpoints have been in existence since 1927. Their location, operation, and type of search conducted are unknown, but a cloud on their legality existed from their inception because of the *Carroll* decision and its progeny. Checkpoints were created without statutory or judicial authorization by a blanket claim of authority by the Immigration Service.[46] Only in 1946 was

[46]The assertion of such power is not unusual in our history. "[A] power is frequently yielded to merely because it is claimed, and it may be exercised for a long period in violation of the constitutional prohibition without the mischief which the Constitution was designed to guard against. . . ." Cooley, *Constitutional Law* 71 (1st ed. 1868).

legislation passed to give legal justification to this traffic checking procedure. In 1945, the letter of Attorney General Biddle to the Chairman of the House Committee on Immigration and Naturalization set forth the need for expanding the authority of Immigration officers, stating in part:

> "In the enforcement of the immigration laws, it is at times desirable to stop and search vehicles within a reasonable distance from the boundaries of the United States and *the legal right to do so should be conferred by law.*" H.R.Rep.No.186, 79th Cong. 2d Sess. (1945), 1946 U.S. Code Cong. Service 1414 (Emphasis added).

Although checkpoints had been operating for years, their lack of legal right to exist was recognized by the nation's chief law enforcement officer who sought legislation to operate the checkpoints. The request to search without a warrant within a reasonable distance of an external boundary was enacted with a provision allowing interrogation of persons "believed to be alien[s]." *See* 8 U.S.C. §1357(a)(1) & (3). This general interrogation authority for immigration officers was subordinated to the traditional requirements of reasonable belief that the person interrogated is an alien. *See Au Yi Lau v. Immigration and Naturalization Service*, 445 F.2d 217 (D.C. Cir. 1970). Under the principles of *ejusdem generis*, it is difficult to sustain an interpretation of an open-ended authority to search vehicles for aliens away from the border without limitation when the same legislation so carefully circumscribes the power of the officer to conduct a simple interrogation.

The Congressional authorization was subject both to the limitation of "reasonable distance" and to the requirement of consistency with the Fourth Amend-

ment and this Court's opinions dating from *Carroll*. The statute, when construed in light of previous precedent and in the context of other subsections, cannot be offered as authority excusing the requirement of probable cause for a vehicle search away from the border or its functional equivalent.

5. The application of the three point test of *Stovall v. Denno*, 388 U.S. 293, 297 (1967) favors the "retroactive" requirement of probable cause for alien vehicle searches.

If this Court were to determine that the requirement of probable cause for warrantless checkpoint searches for aliens is a "new constitutional rule," which respondent submits it is not, then a question of the retroactivity of this new rule would have to be considered. In *Stovall v. Denno*, 388 U.S. 293, 297 (1967), this Court announced the criteria guiding the resolution of the issue of retroactivity: (a) the purpose to be served by the new standards, (b) the extent of reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards.

The purpose of the "new rule" is to implement the principles laid down in *Weeks v. United States*, 232 U.S. 383 (1914), and *Carroll v. United States*, 267 U.S. 132 (1925). In *Carroll*, prohibition officers were involved in the stop and search for contraband of an automobile traveling upon the highway, but the distinction between *Carroll's* facts and a stop and search at a checkpoint is insignificant.

The reliance on a practice inconsistent with established precedent or an overly broad interpretation of the Congressional authority granted in 1946 (8 U.S.C. 1357(a)(3)) does not bar "retrospective" application of the probable cause rule.[47] The principal efforts of the Immigration Service to deter and remove illegal aliens will not be adversely affected by the "retroactive" application of the rule; such application is consistent with holding the Immigration Service's law enforcement arm, the Border Patrol officers who also serve as Customs officers, to the same requirements that govern other federal law enforcement officers.

6. The Court of Appeals in *Bowen v. United States* held its decision was not retroactive.

Although the petitioner has claimed the Court of Appeals applied its own "new rule" retroactively, the opinion of the majority (Part II) rejected the application of *Bowen* to cases on appeal and even denied the appellant Bowen relief. 500 F.2d 960, 979, 981. Circuit Judge Wallace, speaking for this majority, stated:

> "We are applying the *Almeida-Sanchez* rule to searches conducted at fixed checkpoints only to deter these unconstitutional procedures in the future. Our reason for applying the rule demonstrates that it should be applied *prospectively only*." 500 F.2d 960, 981. [Emphasis added].

[47] After the decision in *Almeida-Sanchez* and the remand of *Bowen*, the Immigration Service can hardly claim reliance upon the legislation or lower court opinions to justify the continuation of causeless checkpoint vehicle searches for aliens.

Given the petitioner's admission that courts of appeals may establish different cut-off dates for the application of the "new rule" (Brief for Pet. 55), the date established by the Court of Appeals (21 June 1973) should be respected. Not a single circuit judge articulated the strained interpretation for differing cut-off dates suggested by the petitioner. Now that the case has reached this Court, the determination of retroactivity will have to be made not in light of the past decision of the Ninth Circuit, but upon the established precedent of this Court.

B. The federal exclusionary rule should be applied to federal Border Patrol officers conducting alien checkpoint automobile searches prior to 9 May 1974.

The petitioner contends that even if *Carroll* foreshadowed the rule of probable cause for alien checkpoint automobile searches, the policy underlying the federal exclusionary rule precludes its application to such searches conducted before the *Bowen* decision (9 May 1974).

The petitioner's reliance on *Michigan v. Tucker*, 417 U.S. 433 (1974), is misplaced, for it is difficult to claim here that "the official action was pursued in complete good faith" when *Carroll* was on the books since 1925. It is impossible to make such a claim after *Almeida-Sanchez* was decided. *Michigan v. Tucker* concerned an interrogation that took place before *Miranda v. Arizona*, 284 U.S. 436 (1966); thus, it was impossible for the officers who conducted the interrogation to be aware of

"the specific protective guidelines, now known as the *Miranda* rules." 417 U.S. 433, 443. That vehicle searches require probable cause is a rule of long standing and well known in the field of law enforcement; its application to alien searches should not now be treated as a unique exception to the rule formulated in *Weeks v. United States*, 232 U.S. 383 (1914), and followed ever since in federal criminal prosecutions.

The respondent recognizes that the exclusionary rule has been criticized by many who are not familiar with its daily implementation in the trial courts. The rule serves the meritworthy purpose of isolating the judiciary from possible cooperation in police wrongdoing and in inhibiting such police conduct. The petitioner asks this Court for an innovative exception to the exclusionary rule based upon language appearing in *Schneckloth v. Bustamonte*, 412 U.S. 218, 250 (1973), and that of Justice Powell in *Cardwell v. Lewis*, 417 U.S. 583, 596 (1974). However, that language proposes to eliminate the use of the Fourth Amendment exclusionary rule where state prisoners in federal habeas corpus proceedings attack their state convictions. Such language is irrelevant to a case involving a federal criminal defendant on direct appeal. The petitioner agrees with the conclusion and result reached by the Ninth Circuit, but not the date announced for the rule. The critical fact is that the Ninth Circuit was not announcing its own new rule, but merely following the one announced by the Supreme Court in *Almeida-Sanchez*. Since the stop and search of the respondent's automobile took place after that decision, the exclusionary rule must be applied.

CONCLUSION

For the reasons set forth above, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

JOHN J. CLEARY
CHARLES M. SEVILLA
FRANK J. RAGEN
Federal Defenders of San Diego, Inc.
925 First Avenue, Suite 260
San Diego, California 92101
Attorneys for Respondent

DATED: 27 December 1974

APPENDIX A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
(HON. EDWARD A. INFANTE)

IN THE MATTER OF AN APPLICATION BY THE UNITED STATES OF AMERICA FOR AN INSPECTION WARRANT FOR THE IMMIGRATION AND NATURALIZATION SERVICE TO OPERATE A FIXED TRAFFIC CHECKPOINT ON INTERSTATE ROUTE 5 FIVE MILES SOUTH OF SAN CLEMENTE, CALIFORNIA	) NO. Misc. 399) WARRANT OF INSPECTION

TO: Any authorized officer of the Immigration and Naturalization Service including any agent of the U.S. Border Patrol:

Application having been made by the United States for a warrant of inspection for the operation of a fixed checkpoint at San Clemente, California, and having reviewed and considered the affidavits of Robert D. McCord and Richard Wischkaemper, and having reviewed and considered the findings made by the United States District Court in *United States v. Baca*, 368 F.Supp. 398 (S.D.Cal. 1973) and having reviewed and considered a copy of the certified reporter's transcript of the sworn testimony of Deputy Chief Border Patrol Agent Richard E. Batchelor presented in the *Baca* case.

I am satisfied that there is probable cause to believe that mass violations of the Immigration laws of the United States (Title 8, United States Code) have been and are being committed at a point known as the Border Patrol checkpoint on the northbound lanes of Interstate Highway Route 5, approximately five miles south of San Clemente, California.

Wherefore, YOU ARE HEREBY COMMANDED:

(1) to conduct an immigration traffic checkpoint on the northbound lanes of Interstate Route 5, five miles south of San Clemente, California, and;

(2) to stop northbound motor vehicles for the purpose of making routine inquiries to determine the nationality and/or immigration status of the occupants of said vehicles, and;

(3) to conduct a routine inspection of said vehicles for the presence of aliens, and;

(4) since the flow of alien traffic occurs at all hours of the day, and since limited operation of the traffic checkpoint would tend to defeat its purpose, the operation of this checkpoint may be conducted at any time of day or night, and;

(5) a copy of the warrant shall be displayed in a conspicuous manner at the checkpoint location and upon request, shall be given to any person detained.

(6) The Immigration and Naturalization Service shall file a written return on this warrant containing the following:

A. The approximate number of vehicles passing through the checkpoint during the hours of operation;

B. The approximate number of vehicles stopped for questioning concerning citizenship status;

C. The number of vehicles inspected;

D. The number of vehicles in which aliens were discovered;

E. A recapitulation of the total number of deportable aliens apprehended;

F. An inventory of any property seized.

(7) This warrant shall be returned within ten days of this date, as required by law.

Dated this 22nd day of June, 1974.

/s/ Edward A. Infante
Edward A. Infante
UNITED STATES MAGISTRATE

STATE OF CALIFORNIA

COUNTY OF SAN DIEGO

AFFIDAVIT

ROBERT D. McCORD, being first duly sworn, deposes and says:

1. I am an Assistant Chief Patrol Agent assigned to the Chula Vista Sector of the United States Border Patrol I have been employed with the Border Patrol continuously since 1957, except for an eight year period when I was assigned as an investigator with the United States Immigration and Naturalization Service. In the course of my duties I have been assigned in various locations in Texas, Florida, and California. In my present capacity I share responsibility with the Chief Patrol Agent in the administration of the sector

and the operations engaged in by 250 officers and 50 auxillary employees.

2. A key function in our basic strategy is the establishment of highway checkpoints at locations beyond 25 miles from the border, utilizing topographical features and extended highways to permit visual examination of the maximum amount of traffic with a minimum incursion and inconvenience upon the public. The location of the checkpoints are correlated along the entire border and provide an effective secondary line of defense.

3. The existence of the checkpoints is a matter of common knowledge in Mexico and Central America to those persons engaged in the soliciting of persons to be smuggled into the interior United States. Officers in the United States Embassy in El Salvador submitted an official intelligence report through the State Department channels precisely locating the checkpoints in San Clemente and Temecula, California, on the basis of information furnished them by covert sources in El Salvador. Those sources further volunteered the information that admission at the Port of Entry was relatively safe, but clearance through the highway checkpoints presented a hazard. The existence of these traffic checkpoints, therefore, are considered a deterrent to those who would attempt to illegally enter this country from south of our border. Additionally, interviews conducted with illegal aliens apprehended from Central America confirm their knowledge of the highway checkpoints.

4. Attached are Exhibits 1 through 17 revealing that 8,440 aliens were apprehended at the San Clemente checkpoint during the first five months of 1973 and

7,718 during the first five months of 1974, and a total of 16,863 for the calendar year 1973.

5. Based upon statistics maintained by the California Division of Highways, 1,200 cars pass through the checkpoint during an average hour.

6. At the traffic checkpoint located south of San Clemente, California, we stop approximately 50 vehicles during each hour of operation for limited inspection consisting of inquiring of the occupants of the vehicle as to their citizenship status.

7. The average car is detained for questioning of the occupants approximately three to five minutes.

8. The purpose of the inspection at the checkpoint is to intercept those aliens who have successfully penetrated the border or who have violated the terms of the legal admission by proceeding beyond the 25 mile limitation without documentation. The resulting action by the U. S. Border Patrol is to arrange a voluntary departure of any illegal aliens located in lieu of deportation, in all but a miniscule number of cases. Less than 3% of all aliens apprehended at the checkpoint are prosecuted under the criminal provisions of the immigration laws.

9. The bulk of the action taken is enforcement regarding violations of the 25 mile limitation on holders of temporary border passes, I-186 cards (see 8 C.F.R. §212.6) and apprehension of those aliens who have entered the United States without inspection in violation of 8 U.S.C. §1325.

10. Illegal entry of aliens within the Chula Vista sector area of responsibility is increasing at an alarming rate, estimated to be approximately 40,000 entries per month.

11. The major purpose of entry is to secure employment, with 95% of all illegal entrants destined for the Los Angeles area or the central portion of California. All illegal aliens apprehended are interviewed. Through sector apprehension reports it has been determined that the vast majority are in travel to interior points such as Los Angeles, and the San Joaquin Valley of California and further, have been in the United States for a short period of time.

12. Some few of the illegal entrants leave the immediate San Diego area by commercial airline, freight train, or passenger train. The vast majority use motorized vehicles and proceed up Interstate Routes 5 or 395, or State Highway 79. Approximately 70% of all illegal alien travellers traverse Interstate Route 5.

13. The checkpoint at San Clemente is located adjacent to the truck scales maintained by the State of California, with the San Onofre State Park and the Pacific Ocean on the West and Camp Pendleton Marine Corps base to the East. It is 68 miles north of the International Boundary and five miles south of the city limits of San Clemente, California. Circumventing the checkpoint is extremely difficult because of the military patrols at Camp Pendleton and the presence of the State Park rangers between the highway and the ocean.

14. The checkpoint at San Clemente is a permanent structure and is intended to remain in operation 24 hours a day, seven days a week. We are unable to maintain the checkpoint in operation continuously because of safety factors that deteriorate because of inclement weather and traffic in excess of 2,500 cars per hour. We are also unable to maintain the checkpoint because of limitations in manpower available

for assignment as well as the basic allocation to that function. The checkpoint is in operation approximately 60% of the time during the year.

15. Smugglers of aliens and those aliens traveling with prior knowledge of the checkpoint customarily wait for the checkpoint to become inactive, for any of the above reasons, before attempting to continue up the highway. This again demonstrates the deterrent effect which the checkpoints have on the traffic in illegal aliens.

16. I have read the opinion of District Court Judge Turrentine in the case of *United States v. Baca*, District Court Number 14656, and to the best of my knowledge the factual findings in regard to the illegal alien problem, the law enforcement problem, and his analysis of the operation of individual traffic checkpoints are correct.

17. A "drop house" is a staging area to keep illegal aliens awaiting inclement weather or, or, any event that might cause the checkpoint to close down temporarily. Experience has shown when the traffic checkpoint is in operation for extended periods of time those "drop

houses" are utilized by smugglers of aliens. We have found a number of such "houses" located in Oceanside, California, south of the San Clemente checkpoint, which have contained up to 86 aliens at a time.

/s/ Robert D. McCord
ROBERT D. McCORD

Subscribed to before me and sworn to in my presence on 6-21-74.

/s/ Edward A. Infante
Edward A. Infante
United States Magistrate

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

FILED
JAN 30 1975
MICHAEL RODAK, JR., CLE

No. 73-2000

UNITED STATES OF AMERICA, *Petitioner,*

—v.—

JAMES ROBERT PELTIER, *Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 73-2050

UNITED STATES OF AMERICA, *Petitioner,*

—v.—

LUIS ANTONIO ORTIZ, *Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 73-6848

JOHN LEE BOWEN, *Petitioner,*

—v.—

UNITED STATES OF AMERICA, *Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 74-114

UNITED STATES OF AMERICA, *Petitioner,*

—v.—

FELIX HUMBERTO BRIGNONI-PONCE, *Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF THE MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND, *AMICUS CURIAE*

EDWARD A. TOMLINSON
University of Maryland
School of Law
500 West Baltimore Street
Baltimore, Maryland 21201

VILMA S. MARTINEZ
SANFORD JAY ROSEN
JOAQUIN GUADALUPE AVILA
Mexican American Legal
Defense and Educational Fund
145 Ninth Street
San Francisco, California 94113

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II. PROBABLE CAUSE IS REQUIRED FOR AN UNCONSENTED WARRANTLESS SEARCH BY FEDERAL OFFICERS OF THE INTERIOR OF AN AUTOMOBILE FOR ILLEGAL ALIENS CONDUCTED AT A FIXED CHECKPOINT.....

III. WARRANTLESS UNCONSENTED CHECK-POINT SEARCHES OF AUTOMOBILE INTERIORS FOR ILLEGAL ALIENS CONDUCTED BY FEDERAL OFFICERS WITH ONLY AN AREA-WIDE EQUIVALENT OF PROBABLE CAUSE ARE NOT ADMINISTRATIVE SEARCHES PERMISSIBLE UNDER CAMARA V. MUNICIPAL COURT,

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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. 73-2000

UNITED STATES OF AMERICA,

Petitioner,

v.

JAMES ROBERT PELTIER,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

No. 73-2050

UNITED STATES OF AMERICA,

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LUIS ANTONIO ORTIZ,

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No. 73-6848

JOHN LEE BOWEN,

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UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

No. 74-114

UNITED STATES OF AMERICA,

Petitioner,

v.

FELIX HUMBERTO BRIGNONI-PONCE,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND, AMICUS CURIAE

Interest of Amicus Curiae[1/]

The Mexican American Legal Defense and Educational Fund (MALDEF) was established on May 1, 1968, primarily to secure the civil rights of Mexican Americans through litigation and education. In its efforts to assist the Mexican American community to achieve its rights under the law, MALDEF has been involved in litigation which has challenged the traditional barriers facing Mexican Americans: abridgement of participatory, constitutional, and political rights; unequal educational opportunity; discriminatory employment practices; unequal distribution of public services; and law enforcement misconduct. Because both citizens and lawfully admitted resident aliens of Mexican ancestry are frequently victimized be overzealous searches for illegal aliens, MALDEF has challenged such activities in numerous lawsuits. See, e.g., United States v. Guana-Sanchez, U.S.S.Ct. No. 73-820 (amicus brief); Garcia v. Hoobler, __ F. Supp. ____, Civ. Act. 74-301-T (S.D. Cal. Jan. 8, 1975, Order granting defendants' Motions For Summary Judgment And To Dismiss, with leave to plaintiffs to amend it part).

1/ Letters of consent to the filing of this brief from each party in each case have been filed with the Clerk.

QUESTIONS PRESENTED

1. Whether the Fourth Amendment permits federal officers to conduct an unconsented, warrantless search of the interior of an automobile for illegal aliens when the federal officers do not have probable cause for believing either that the automobile to be searched contains illegal aliens, or that the automobile or its contents have recently crossed an international border.

2. Whether the Fourth Amendment permits federal officers to conduct at fixed checkpoints an unconsented, warrantless search of the interior of an automobile for illegal aliens when the federal officers do not have probable cause for believing that the automobile to be searched contains illegal aliens or that the automobile or its contents have recently crossed an international border.

3. Whether the rationale of Camara v. Municipal Court, 387 U.S. 523 (1967), should be extended to sustain, as a lawful administrative search, the warrantless, unconsented checkpoint search of an automobile's interior for illegal aliens conducted by federal officers, on the basis only of an area-wide equivalent of probable cause, and without probable cause for believing that the automobile to be searched contains illegal aliens.

4. Whether the Fourth Amendment permits federal officers to conduct an unconsented, warrantless stop of an automobile on the public highway to question the occupants concerning their right to be or to remain in the United States where the federal officers do not have reasonable grounds for believing that one or more of the occupants are illegal aliens?

STATEMENT OF THE CASES

The Ortiz Case [No. 73-2050].

On November 12, 1973, Border Patrol agents at the United States Border Patrol Immigration Checkpoint at San Clemente,[2] California, stopped Respondent Ortiz while he was driving a 1969 Chevrolet sedan northward on Interstate Highway 5 toward Los Angeles, California. (Appendix to Petition for Writ of Certiorari at 44A.)[3] The San Clemente checkpoint is located 62 air miles and 66 road miles north of the border and lies north of the densely populated San Diego metropolitan area. (App. Pet. in No. 73-2050 at 24A-25A.) Border Patrol agents at the checkpoint directed respondent's automobile to the secondary inspection area at the side of the road. While conducting a routine search, they found three aliens concealed inside the trunk of the automobile.

At the subsequent trial, District Judge Edward Schwartz ruled that the "San Clemente checkpoint is a permanent checkpoint and that the stopping of the vehicle and the search by the Border Patrol was a valid legal search." (App. Pet. in No. 73-2050

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[2] Hereinafter cited as (App. Pet. in No. 73-2050 at __.)

[3] The Border Patrol is a division of the Immigration and Naturalization Service which is a part of the United States Department of Justice.

at 47A.) After a non-jury trial respondent was then convicted on three counts of transporting aliens who were in the country illegally, in violation of 8 U.S. C. § 1324(a)(1-4).

The Court of Appeals subsequently reversed respondent Ortiz's convictions on the authority of its en banc decision in United States v. Bowen, 500 F.2d 960, cert. granted, __U.S.__, 42 L. Ed.2d 47 (1974). In Bowen, the Court of Appeals held, primarily on the basis of this Court's decision in Almeida-Sanchez v. United States, 413 U.S. 266 (1973), that the Fourth Amendment prohibited a checkpoint search of an automobile for aliens conducted without a warrant and without probable cause unless the checkpoint search was the functional equivalent of a border search. For a checkpoint search to be the functional equivalent of a border search, there must be a reasonable certainty, or at least a probability that the vehicle stopped or its contents had recently crossed an international border. 500 F.2d at 966. Under this test the Ninth Circuit subsequently held in United States v. Morgan, 501 F.2d 1351 (9th Cir. 1974) (en banc), that routine searches of automobiles at the San Clemente checkpoint were not the functional equivalent of border searches. The Ninth Circuit, however, limited its decision in Bowen to checkpoint searches conducted after June 21, 1973, the date of this Court's decision in Almeida-Sanchez. Bowen, supra, 500 F.2d at 975-80. Since the search of respondent Ortiz's automobile occurred

after that date and was not deemed a border search, his conviction based on the illegally seized evidence was reversed.

The Bowen Case (No. 73-6848). Petitioner Bowen on January 19, 1971, was driving a pickup with a camper northward on California State Highway 86 when he was stopped at the United States Border Patrol Immigration Checkpoint. (Appendix at 35.)4/ The checkpoint on California State Highway 86 is located 36 air miles and 49 road miles north of the Mexican Border. (App. Pet. in No. 73-2050 at 30A); the population centers of Heber, El Centro, Brawley, Imperial, Westmoreland and Indio lie between the checkpoint and the border. (App. in No. 73-6848 at 39.) Petitioner satisfied the Immigration Officer on Duty as to his United States citizenship (App. in No. 73-6848 at 36). The officer noticed nothing suspicious or unusual about petitioner Bowen or the camper (App. in No. 73-6848 at 41), but nevertheless, asked him to open up the back of the camper to search for illegal aliens (App. No. 73-6848 at 36). Petitioner Bowen opened the door of the camper, and the officer immediately detected the smell of marijuana (App. in No. 73-6848 at 41). The officer then entered the interior of Bowen's camper through a rear door and, with the assistance of a flashlight, discovered a quantity of marijuana (App. in No. 73-6848 at 36 and 43-47). No illegal aliens were discovered.

4/ Hereinafter cited as (App. in No. 73-6848 at __.).

Bowen's motion to suppress the evidence was denied on August 23, 1971, and he was subsequently convicted by a jury on August 31, 1971 of smuggling marijuana into the United States from Mexico, transporting marijuana, possessing depressant and stimulant drugs in violation of federal law. The Ninth Circuit initially affirmed the convictions in United States v. Bowen, 462 F.2d 347 (9th Cir. 1972), but this Court then remanded the case to the Ninth Circuit for further consideration in light of Almeida-Sanchez, 413 U.S. 915 (1973). On remand, the Ninth Circuit held that routine immigration searches at fixed checkpoints removed from the border, conducted without a warrant or probable cause, violated the Fourth Amendment. United States v. Bowen, 500 F.2d 960 (9th Cir. 1974) (en banc), cert. granted, ___ U.S. ___, 42 L.Ed.2d 47 (1974). Nevertheless, they affirmed Bowen's conviction since the search of his camper occurred prior to this Court's decision on June 21, 1973 in Almeida-Sanchez.

The Brignoni-Ponce Case (No. 74-114). Respondent Brignoni-Ponce on March 11, 1973, was driving north on Interstate Highway 5 near San Clemente, California, when his car was stopped by agents of the United States Border Patrol. (Appendix at 5, 8.)5/ The checkpoint was closed due to lack of manpower and inclement weather, but two Border Patrol agents were on duty parked in a patrol car observing northbound traffic. (App. in No. 74-114 at 6.) The patrol car was parked at a 90° angle to the highway with its headlights on. In the early evening hours, the agents observed Brignoni-

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5/ Hereinafter cited as (App. in No. 74-114 at __.).

Ponce's car going north and decided that they "wished to inspect" it. (App. in No. 74-114 at 6.) The agents' desire to inspect the car was based solely on the occupants' Mexican appearance. (App. in No. 74-114 at 9.) Upon questioning the passengers in Brignoni-Ponce's vehicle concerning their citizenship, the agents determined that they were aliens illegally in the United States. After unsuccessfully challenging the validity of the stop, Brignoni-Ponce was convicted of two counts of transporting illegal aliens in violation of 8 U.S.C. 1324(a)(2). Furthermore, the court rejected the government's attempt to distinguish this case from Almeida-Sanchez on the grounds that Almeida-Sanchez involved a search rather than a stop. The Ninth Circuit reasoned that Almeida-Sanchez "reflects at least as much concern with the initial stop as with the subsequent search." 499 F.2d at 1111. Thus, for purposes of Fourth Amendment protections, roving patrol searches as well as roving patrol stops are prohibited.

Since the stopping of Brignoni-Ponce's automobile and the discovery of illegal aliens occurred prior to the decision announced in Almeida-Sanchez, an issue of retroactive application was raised. In United States v. Peltier, 500 F.2d 985 (9th Cir. 1974) (en banc), the Ninth Circuit held that Almeida-Sanchez would be applied to similar cases pending an appeal at the time of this Court's decision in Almeida-Sanchez. However, in cases involving fixed checkpoint searches conducted prior to Almeida-Sanchez, there would be no retroactive application. United States v. Bowen, 500 F.2d 960 (9th Cir. 1974) (en banc). Since

the Ninth Circuit characterized Brignoni-Ponce's stop as a roving patrol stop rather than a fixed checkpoint stop, Almeida-Sanchez was applied retroactively in this case, resulting in the reversal of Brignoni-Ponce's conviction.

The United States Court of Appeals for the Ninth Circuit reversed the conviction. United States v. Brignoni-Ponce, 499 F.2d 1109 (9th Cir. 1974) (en banc). The Court of Appeals unanimously held that a warrantless stop of a vehicle to inquire as to the citizenship of the occupants is permissible under the Fourth Amendment only if the Border Patrol agents have a "founded suspicion" that the occupants of the vehicle are aliens whose presence in this country is unlawful. 499 F.2d at 1112. The mere fact that Brignoni-Ponce and his passengers appeared to be of Mexican descent did not provide the agent with adequate cause to stop the automobile.

The Peltier Case (No. 73-2000). On February 28, 1973, Respondent Peltier was driving northward on United States Route 395 near Temecula, California, when his automobile was pursued and stopped by a roving border patrol. The Border Patrol officers then searched the trunk of the automobile for concealed aliens. The stop took place approximately 70 air miles north of the Mexican border. The Border Patrol agents decided to stop and search Peltier's automobile because he appeared to be of Mexican descent and was driving an old model car. After stopping the car, the agents also observed that it bore out-of-state license plates, that Peltier was alone in the car, and that there were some

clothes in the back seat. Upon searching the car, the agents did not discover any illegal aliens, but did discover a quantity of marijuana in the trunk. Peltier was subsequently convicted in the United States District for the Southern District of California of possessing marijuana with intent to distribute in violation of 21 U.S.C. 844(a)(1), after Peltier's motion to suppress the marijuana as evidence was denied. Subsequent to the District Court's decision, this Court held in Almeida-Sanchez that a warrantless roving patrol search of an automobile for concealed aliens violates the Fourth Amendment when the Border Patrol agents have acted without probable cause for believing that the automobile contained illegal aliens. The Court of Appeals for the Ninth Circuit then reversed Peltier's conviction on the authority of Almeida-Sanchez. United States v. Peltier, 500 U.S. 985 (9th Cir. 1974). Although the roving patrol search in this case occurred before June 21, 1973, the date of this Court's decision in Almeida-Sanchez, the Ninth Circuit held that Almeida Sanchez "should be applied to similar cases pending an appeal on the date the Supreme Court's decisions was announced." 500 F. 2d at 986 (footnote omitted).

SUMMARY OF ARGUMENT

Over the last several decades, this Court has developed a substantial body of Fourth Amendment law. This body of law emphasizes probable cause as the normal predicate for a constitutionally valid search of an automobile's interior. While a somewhat lesser standard may justify the investigatory stop of a person or of an automobile on a public highway, random or routine stops have not received the Court's approval. A separate rationale for routine administrative searches has been developed, but that rationale has so far been limited to cases where there are at least the safeguards of the warrant process or where intensively regulated businesses are involved. Border searches have also received separate treatment, but the government recognizes that the instant four cases do not involve border stops or searches. (Brief for Petitioner United States in No. 73-2050 at 16.)

Almeida-Sanchez v. United States, 413 U.S. 266 (1973) is consistent with this body of law. In this amicus brief MALDEF argues that this Court's basic Fourth Amendment jurisprudence not only dictated the result in Almeida-Sanchez but also requires the Court to condemn the searches and stops in the instant four cases. Automobile searches at fixed checkpoints are essentially no different from automobile searches conducted by roving border patrols, and investigatory stops of automobiles are subject to the same prohibition of routine and random searches. The application of this Court's basic Fourth Amendment law to these cases is especially important to

those Mexican Americans, both citizens and lawfully admitted aliens, who are the actual or potential victims of automobile stops and searches conducted by Border Patrol agents looking for illegal aliens. The application of basic Fourth Amendment principles to these cases would operate to vindicate the rights of United States citizens of Mexican descent, and lawfully resident aliens of similar descent, to travel on the public highway free of random, discriminatory or otherwise unreasonable searches and seizures.

Since no new law is involved in these cases, the basic Fourth Amendment principles developed by this Court should be applied in these cases. Thus, the judgments of the United States Court of Appeals for the Ninth Circuit in Ortiz (No. 73-2050), Brignoni-Ponce (No. 74-114) and Peltier (No. 73-2000), reversing the respondent convictions, should be affirmed, while the judgment of the United States Court of Appeals for the Ninth Circuit in Bowen (No. 73-6848), affirming the petitioner's conviction, should be reversed. 6/

6/ This brief does not present additional argument on the retroactivity issue presented in Bowen (No. 73-6848), Brignoni-Ponce (No. 74-114) and Peltier (No. 73-2000). On this issue MALDEF adopts the arguments advanced by each of the defendants.

ARGUMENT

I

PROBABLE CAUSE IS REQUIRED FOR AN UNCONSENTED WARRANTLESS SEARCH BY FEDERAL OFFICERS OF THE INTERIOR OF AN AUTOMOBILE FOR ILLEGAL ALIENS

The defendants in these cases, Ortiz in No. 73-2050, Brignoni-Ponce in 74-114, Peltier in 73-2000 and Bowen in 73-6848, were all doing what hundreds of thousands, if not several million, Americans do every day: they were lawfully driving an automobile on a public highway within one hundred miles of an external boundary of the United States. Border Patrol agents stopped, and in three of the four cases searched, the defendants' automobiles for illegal aliens.

In Ortiz (No. 73-2050), the respondent was stopped and his automobile searched for illegal aliens at a permanent immigration checkpoint on Interstate Route 5 near San Clemente, California, about 62 miles from the Mexican border. (App. Pet. in No. 73-2050 at 43A-45A.) In Bowen (No. 73-6848), the petitioner was stopped and his automobile searched at a similar checkpoint on California State Highway 86 approximately 36 air miles and 49 highway miles north of the Mexican border. United States v. Bowen, 500 F.2d 960, 961 (9th Cir. 1974). Both cases involved routine searches where the Border Patrol officers who conducted the searches had no reason to believe that the drivers of the automobile were other than innocent and law-abiding individuals exercising their rights to operate a motor vehicle on a public

highway within one hundred miles of an external border.

In Brignoni-Ponce (No. 74-114), the agents stopped but did not search the respondent's automobile. The stop occurred to the north of a fixed checkpoint not then in operation. The officers' decision to stop the vehicles was based solely on the occupants' Mexican appearance. (App. No. 74-114 at 9.)

In Peltier (No. 73-2000), the agents both stopped and searched the respondent's automobile at a spot approximately a mile and a half north of a checkpoint that was also not in operation. The agents acted because Peltier was alone driving an old model car with out-of-state license plates in an area the offices knew to be frequented by smugglers of illegal aliens.

This Court has consistently required probable cause as the minimum requirement for a search by federal officers of an automobile stopped on a public highway. Carroll v. United States, 267 U.S. 132, 149 (1925) ("On reason and authority the true rule is that if the search and seizure without a warrant are made upon a belief, reasonably arising out of circumstances known to the seizing officer, that an automobile or other vehicle contains that which by law is subject to seizure and destruction, the search and seizure are valid."). The officers who make the stop must have probable cause for believing that the particular automobile to be searched is carrying seizable items that are the object of the search. Coolidge v. New Hampshire, 403 U.S. 443, 460-62 (1971); Chambers v. Maroney, 399 U.S. 42, 48, 51 (1970): See generally, Note, Warrantless

Searches and Seizures of Automobiles, 87 HARV.L. REV. 835 (1974). This probable cause requirement should be applied to the automobile searches in the instant cases to avoid the creation of a Fourth Amendment free-fire zone in the hundred mile wide strip contiguous to an external boundary of the United States.

Carroll v. United States, 267 U.S. 132 (1925), is the leading case explicitly recognizing the probable cause requirement for automobile searches on public highways. In Carroll, federal officers discovered and seized contraband liquor during the course of a warrantless search of an automobile stopped on a public highway. Federal prohibition agents at that time faced a law enforcement problem comparable in magnitude to that faced today by the Border Patrol. The transporation of contraband liquor by automobiles was an essential part of most boot legging operations just as the transporting of illegal aliens by automobiles in an important part of most alien smuggling operations.

Although recognizing the significant constitutional interest under the Eighteenth Amendment advanced by the officers' actions, nevertheless, in Carroll the Court required that warrantless searches and seizures of contraband located in automobiles be predicated upon probable cause, and held that: "[t]he measure of legality of such a seizure is, ...that the seizing officer shall have reasonable cause for believing that the automobile which he stops and seizes has contraband liquor therein which is being illegally transported." 267 U.S. at 155-54. The Court further held that the Fourth Amendment

guaranteed to travellers on a public highway "a right to free passage without interruption or search unless there is known to a competent official authorized to search, probable cause for believing that their vehicles are carrying contraband or illegal merchandise. 267 U.S. at 153.

If the Fourth Amendment requires that federal agents have probable cause for believing that a specific automobile is carrying contraband liquor before they search that automobile for the liquor, it also requires that federal agents have probable cause for believing that a specific automobile is carrying illegal aliens before they search that automobile for the aliens. As stated by the Court in Almeida-Sanchez v. United States, 413 U.S. 266, 269 (1973): "...[T]he Carroll doctrine does not declare a field day for the police in searching automobiles. Automobile or no automobile, there must be probable cause for the search." (footnote omitted)

Almeida-Sanchez merely reiterated the well established principle that automobiles are protected by the Fourth Amendment. This protection is triggered by an individual's expectation of privacy, Katz v. United States, 389 U.S. 347, 351-52 (1967), and is not dependent on the type of contraband sought to be seized. Thus the mere fact that illegal aliens are the targets of a search should have no bearing on the probable cause requirement afforded by the Fourth Amendment. Such protection is warranted in the cases at bar, moreover, since searches of motor vehicles for illegal aliens are similar in their intrusiveness into constitutionally protected areas as is the search for contraband liquor. The federal agents

may search in the trunk, under the hood, in the interior of a camper or of a pickup truck, behind the back seat, and in any other area of a vehicle where a human being could reasonably be concealed. In Almeida-Sanchez, for example, the agents searched under the rear seat of the automobile, which the Court of Appeals concluded was a place where an alien might conceal himself by removing the springs, 452 F.2d 459, 461 (9th Cir. 1971), rev'd 413 U.S. 266 (1973), while in Bowen (No. 73-6848) and in Peltier (No. 73-2000), respectively, the agents searched the interior of a camper truck and the trunk of an automobile. In United States v. Madueno-Astorga, 503 F.2d 820, 821 (9th Cir. 1974), the agents even removed the back seat of an automobile when the driver was unable to open the trunk.

In the course of these searches federal agents examine areas of the automobile that are private and closed to public view; they may even come across, in "plain view", seizable items other than the illegal aliens which are the object of their searches. In Almeida-Sanchez and many other cases marijuana has been found, and the drivers have been prosecuted for the illegal transportation of marijuana rather than the illegal trasportation of aliens. See, e.g., United States v. Phillips, 496 F.2d 1395 (5th Cir. 1974); United States v. Nevarez-Alcantar, 495 F.2d 678 (10th Cir. 1974); United States v. Martinez-Miramontes, 494 F.2d 808 (9th Cir. 1974). This phenomenum has led at least one circuit court judge to comment in the related area of airport searches that "[i]t is passing strange that most of these airport searches find narcotics and not bombs, which might cause us to pause in our

rush toward malleating the Fourth Amendment in order to keep the bombs from exploding." United States v. Legato 480 F.2d 408, 414 (5th Cir. 1973) (Goldberg, J., concurring), cert. den., 414 U.S. 979 (1973).

To prevent abuses in such searches, the scope of the search should be limited by the nature of the item sought to be seized. For example, a search of an automobile for illegal aliens does not authorize a search of the occupants or of the handbags or other similar containers in the automobile. See United States v. Di Ree, 332 U.S. 581, 586-587 (1948). The application of this familiar principle to the instant cases is conceded by the United States in Ortiz. (No. 73-2050) (Brief at 29.)

Certainly, this Court has not vitiated the probable cause requirement for the search of the interior of an automobile on the grounds that such a search is less intrusive than a search of a person or of a dwelling. Although for purposes of the Fourth Amendment there is some constitutional difference between searches of houses and of cars, Chambers v. Maroney, 399 U.S. 42 (1970), this difference results from the high degree of mobility enjoyed by motor vehicles and only permits law enforcement officers in some circumstances to dispense with the warrant requirement. Nothing has affected the probable cause requirement established in Carroll for motor vehicle searches. 399 U.S. at 51. In this respect Cardwell v. Lewis, ___ U.S. ___, 41 L.Ed.2d 325 (1974), is consistent with the Carroll-Chambers line of decisions because in Cardwell, the Court merely upheld a warrantless examination or "search," based on pro-

bable course, of the tire tread and exterior paint of the defendant's automobile. The observation in the plurality opinion, 41 L. Ed.2d at 335, that a person has less of an expectation of privacy in a motor vehicle than in a dwelling, and that automobile searches are therefore less intrusive than residential searches, was not made in the context of the search of the interior of an automobile or camper. If Cardwell had involved an interior search, the plurality's statement that automobiles are seldom a "repository of personal effects" and that their "contents are in plain view" would simply not be true. Millions of Americans carry personal effects in private areas of their automobile, such as the trunk or the glove compartment or the interior of a camper. These areas are concealed from public view by the exterior of the vehicle. An expectation of privacy in one's personal effects should not be defeated simply because one transports them on a public highway. We are a free and mobile society whose members frequently change residences, and who frequently motor to vacations at summer homes, campsites and resort hotels. Surely, our household effects are not fair game for an unconsented warrantless non-probable cause search simply because they are in transit in the interior of a motor vehicle on a public highway. As noted in Coolidge v. New Hampshire, 403 U.S. 443, 461-62(1971), "The word 'automobile' is not a talisman in whose presence the Fourth Amendment fades away and disappears." This Court therefore should not sanction warrantless interior automobile searches on less than probable cause on the ground that such searches are less intrusive than other searches.

A final consideration to be taken into account concerns a widespread practice of apprehending illegal aliens by state and local law enforcement agencies. In the Southwest, city police, county sheriffs, and other law enforcement officers often participate in stopping, detaining, and interrogating persons to determine their citizenship. E.g., United States v. Mallides, 473 F.2d 859 (9th Cir. 1973) (two city police officers stopped an automobile due to their suspicion that the car contained illegal aliens); United States v. Guana-Sanchez, Cr. No. 72 CR 50 (Unreported decision, N.D. Ill. June 8, 1972), affirmed, 484 F.2d 590 (7th Cir. 1973), cert. granted, ___ U.S. ___, 41 L.Ed.2d. 1138 (1974) (No. 73-820). If the protections afforded by the Fourth Amendment are not made applicable to these stops, then state and local law enforcement officials can stop any person of Mexican descent ostensibly for the purpose of determining the person's citizenship. Thus local law enforcement officials will be able to circumvent the guarantees provided by the Fourth Amendment simply by relying on the wide discretion afforded to immigration officers pursuant to 8 U.S.C. §1357(a)(1). See United States v. Bowman, 487 F.2d 1229 (10th Cir. 1973) (where immigration officials were held to be empowered to stop individuals to determine their citizenship without a warrant, without probable cause, and even without reasonable suspicion that the persons are illegal aliens).

Thus both to identify further the limitations on the stop and search powers of federal Border Patrol officers, and to help prevent state and local police circumvention

of the Fourth Amendment rights of Mexican appearing individuals, this Court should apply the probable cause requirement to unconsented, warrantless searches of automobiles by federal officers seeking illegal aliens.

ARGUMENT

II

PROBABLE CAUSE IS REQUIRED FOR AN UNCONSENTED WARRANTLESS SEARCH BY FEDERAL OFFICERS OF THE INTERIOR OF AN AUTOMOBILE FOR ILLEGAL ALIENS CONDUCTED AT A FIXED CHECKPOINT.

In Ortiz (No. 73-2050) and in Bowen (No. 73-6848) the automobile searches were conducted at fixed border patrol checkpoints, at San Clemente, California, and on California State Highway 86, respectively, while in Peltier (No. 73-2000) the respondent's automobile was stopped and searched by a roving border patrol. In Brignoni-Ponce (No. 74-114) there was no automobile search. The government concedes that the fixed checkpoint at San Clemente, Brief for Petitioner in Ortiz, No. 73-2050 at 16, is not the functional equivalent of the border permitting a warrantless full-scale border-type search of a vehicle for aliens or contraband because it cannot be said with any degree of assurance that the vehicles searched or their contents had recently crossed the border. This concession would also seem to cover the checkpoint on California State Highway 86 which the Court of Appeals in United States v. Bowen, 500 F.2d 960, 966 (9th Cir. 1973) (en banc), specifically found not to be the functional equivalent of the border since there was no reasonable certainty or even probability that the vehicles searched or their contents had recently crossed an international border. The government nevertheless argues in these cases that Almeida-

Sanchez v. United States, 413 U.S. 266 (1973), only condemns warrantless automobile searches for aliens conducted without probable cause by roving patrols and does not affect similar searches at fixed checkpoints. This distinction is untenable, and the Fourth Amendment, as consistently construed by this Court from Carroll v. United States, 267 U.S. 132 (1925), through Almeida-Sanchez in 1973, prohibits both roving patrol and fixed checkpoint searches for aliens that are conducted by federal agents without consent, without a warrant and without probable cause.

The fixed checkpoints in these cases are not "fixed" by any immutable necessity or by any court order but by executive officials within the Border Patrol. The government recognizes that the sites for fixed checkpoints are selected "as the result of careful study by relatively high-level officials of the Border Patrol." (Brief for Petitioner in Ortiz, No. 73-2050 at 13.) Even assuming that the Border Patrol has engaged in careful study in selecting the sites for fixed checkpoints, additional study, especially of the data collected from the operation of existing checkpoints, may convince the Border Patrol to open new checkpoints or to move existing checkpoints. A "fixed" checkpoint is therefore fixed only by executive decision and may move and become "roving" by executive decision. There is nothing inherently fixed about any checkpoint's location. While some locations may be more suitable geographically than others, functionally a checkpoint is very mobile. The signs, traffic cones, lights, and uniformed officers which are

the essential elements of a checkpoint may readily be assembled, with portable or temporarily installed equipment if necessary, at a new location where there is an adequate stretch of open road to permit safe operation.

The Border Patrol has statutory authority to search vehicles for aliens, and presumably to establish checkpoints to accomplish these searches, within a reasonable distance from any external boundary of the United States. 8 U.S.C. 1357(a)(3). "Reasonable distance" has been defined by regulation to mean 100 miles in most cases. 8 C.F.R. 287.1. While this statute and regulation cannot authorize the Border Patrol to conduct otherwise unconstitutional searches, Almeida-Sanchez v. United States, 413 U.S. 266, 272 (1973), they do authorize the Border Patrol within constitutional limits to site checkpoints and search vehicles, operated to uncover illegal aliens, anywhere within one hundred miles of the border. Under the authority conferred by the statute and the regulations, the Border Patrol could conceivably establish a "fixed" checkpoint anywhere on the New Jersey Turnpike to search vehicles for illegal aliens.7/

7/ The government recognizes that checkpoint searches at Times Square, and presumably also on the New Jersey Turnpike, would be unreasonable and hence unconstitutional because the local conditions at those sites do not provide the "area-wide equivalent of probable cause" which the government argues is the sole constitutional

More realistically, the Border Patrol may find at some future date that it is more effective to replace its temporary checkpoints with a system of mobile checkpoints on both main and back roads that operate to surprise the smuggler of illegal aliens by moving or "roving" from one location to another. Since no checkpoint is permanently fixed and since mobile checkpoints are no different than roving patrols, the Fourth Amendment prohibits warrantless automobile searches for aliens without probable cause at Border Patrol checkpoints.

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prerequisite for a checkpoint search. (Brief for Petitioner in Brignoni-Ponce, No. 70-114, at 19.) This recognition that many potential checkpoint locations would be unconstitutional undermines the government's contention that subsequent judicial consideration of the reasonableness of the checkpoint's operation in the context of a motion to suppress is an adequate substitute for advance judicial approval of the checkpoint's operation through a warrant procedure. How many innocent motorists will be subject to unconstitutional vehicle searches at a checkpoint whose location is improper before a guilty one is found who subsequently challenges the search by a motion to suppress in a criminal prosecution? The number may be very high indeed because the subsequent judicial challenge may be slow in coming, particularly if the government exercises its discretion, as it frequently does, not to prosecute illegal aliens criminally but to deport them.

There is another, more basic reason why fixed checkpoint searches of automobiles for illegal aliens should be treated the same as roving patrol searches. In Almeida-Sanchez, the Court condemned the roving patrol search because it "was conducted in the unfettered discretion of the members of the Border Patrol, who did not have a warrant, probable cause or consent." 413 U.S. at 268 (footnote omitted). Checkpoint searches are also conducted in the "unfettered discretion" of Border Patrol agents without a warrant, probable cause or consent. Only a small percentage of the automobiles that pass through a fixed checkpoint are searched for aliens. At the busy San Clemente checkpoint only three per cent of the vehicles are even stopped for inquiry regarding the citizenship of the occupants and for possible search of the car. (App. Pet. in No. 73-2050 at 16A-17A.) At the checkpoint on California State Highway 86 the Border Patrol is more active and seventy-five per cent of the vehicles are stopped for inquiry but only ten or fifteen per cent are searched for illegal aliens. (App. Pet. in No. 73-2050 at 30A). Nationwide, the Border Patrol estimates that approximately 27.4 million vehicles passed through "fixed" checkpoints in fiscal year 1974. Only 320,000 vehicles, slightly over one per cent of the total, were subjected to a physical inspection or search for aliens. (Brief for Petitioner in Ortiz, No. 73-2050 at 28-29.)

The "fixed checkpoint" thus closely resembles the roving border patrol because only a small percentage of the vehicles encountered or observed by the federal agents

operating either the "fixed" checkpoint or the roving patrol are stopped and searched. The majority of the Court of Appeals recognized this important factor in United States v. Bowen, 500 F.2d 960, 964 (9th Cir. 1974) (en banc): "Since not all vehicles passing through a checkpoint are stopped, and since not all vehicles stopped are searched, the officer at the checkpoint still retains a good deal of discretion to 'single out' some travelers for stops or intrusive searches."

No doubt some roving patrol operations, especially those conducted at night, are more frightening or traumatic to the driver and occupants of the car searched than are the more anticipated and orderly "fixed" checkpoint searches. However, it is only the stop by the roving patrol which may have a different traumatic effect and not the subsequent search of the private areas of the vehicle's interior. The search of the vehicle is exactly the same regardless of whether it takes place on the open highway or at a "fixed" checkpoint. Furthermore, Border Patrol agents on roving patrol apparently are uniformed and in official vehicles. The indicia of lawful authority thus quickly become evident to a driver stopped by a roving border patrol, just as the indicia of lawful authority are evident to the driver who approaches a "fixed" automobile checkpoint. In both instances a search of the automobile for illegal aliens is normally conducted at the side of the road to avoid blocking ongoing traffic. The search -- the warrantless, unconsented search, not based upon probable cause -- is an indignity that innocent drivers and passengers should not be subjected

to at the whim of the Border Patrol agent. The crucial factor is whether or not there is probable cause for the search by law enforcement officers, and not whether the search takes place at night or in the daytime or on the open road or at a "fixed" checkpoint.

The unfettered discretion of Border Patrol agents at "fixed" checkpoints to search some vehicles for illegal aliens while not searching the great majority of vehicles which pass through the checkpoints adversely affects the rights of Mexican Americans in two respects. First, the initial stop is usually based upon constitutionally impermissble criteria, e.g., a person's Mexican appearance. Second, these arbitrary stops infringe the victims' constitutional right of interstate travel.

In both Brignoni-Ponce (No. 74-114) and in Peltier (No. 73-2000), the Border Patrol agents stopped the respondents' automobiles because the occupants appeared to be of Mexican descent. It is not a crime to be of Mexican descent, nor is a person's Mexican appearance a proper basis for arousing an officer's suspicions. Those broad descriptions literally fit millions of law abiding American citizens and lawfully resident aliens. United States v. Camacho-Davalos, 488 F.2d 1383 (9th Cir. 1973). The Ninth Circuit has rightly condemned law enforcement officers, both state and federal, who stop cars because their occupants fit the loose description of "Mexican appearing." United States v. Mallides, 473 F.2d 849 (9th Cir. 1973)(state officers); United States v. Brignoni-Ponce, 499 F.2d 1109

(9th Cir. 1974)(Border Patrol agents).

A person's racial or ethnic background or appearance is a neutral factor in appraising probable cause or reasonable suspicion, United States v. Bugarin-Casas, 484 F.2d 853, 854 (9th Cir. 1973), cert. den., ___U.S. ___, 94 S. Ct. 881 (1974); and to permit law enforcement officers to base their decision to stop or search an automobile on the racial or ethnic appearance of the occupants would be to sanction the very same discriminatory law enforcement condemned in Yick Wo v. Hopkins, 118 U.S. 356 (1886) as violative of the Equal Protection Clause of the Fourteenth Amendment. Such a conclusion is compelled by this Court's recent decisions characterizing Mexican Americans as an identifiable group for Fourteenth Amendment purposes. See Keyes v. School Dist. No. 1, Denver, 413 U.S. 189 (1973); White v. Regester, 412 U.S. 755 (1973); Hernandez v. Texas, 347 U.S. 475 (1954). This discrimination is inevitable if Border Patrol agents enjoy unfettered discretion to search whatever vehicles they chose, since they will naturally continue to focus on drivers of Mexican descent or who are of Mexican appearance, or whose passengers meet these criteria, as the most likely targets for routine or random vehicle searches.

Persons of Mexican descent or appearance enjoy the same constitutional right to travel on the public highways free of unreasonable searches and seizure as do other United States citizens and lawful resident aliens. The basis for this fundamental right was recognized in Carroll v.

United States, 267 U.S. 132, 153-54 (1925):

> Travelers may be so stopped in crossing an international boundary because of national self-protection reasonably requiring one entering the country to identify himself as entitled to come in, and his belongings as effects which may be lawfully brought in. But those lawfully within the country, entitled to use the public highways, have right to free passage without interruption or search unless there is known to a competent official authorized to search, probable cause for believing that their vehicles are carrying contraband or illegal merchandise.

The Carroll decision, of course, is fully consistent with more judicial and congressional decisions extending and protecting the constitutional right of interstate travel. See, e.g., Shapiro v. Thompson, 394 U.S. 618 (1969), modified, Edelman v. Jordan, ___ U.S. ___, 94 S. Ct. 1347 (1974); Title II of the Civil Rights Act of 1964, 42 U.S.C. §§2000a et seq. (Public Accomodations).

The records in the cases at bar clearly demonstrate the substantial danger of infringement of the right of travel resulting from the present operations of "fixed"

checkpoints. By imposing the protections afforded by the probable cause requirement on searches conducted at "fixed" checkpoints, as they already have been imposed on the searches conducted by roving patrols, the Court will prevent further violations of the rights of Mexican Americans to travel on the highways without the fear of being stopped or searched merely because of their Mexican appearance.

ARGUMENT

III

WARRANTLESS UNCONSENTED CHECKPOINT SEARCHES OF AUTOMOBILE INTERIORS FOR ILLEGAL ALIENS CONDUCTED BY FEDERAL OFFICERS WITH ONLY AN AREA-WIDE EQUIVALENT OF PROBABLE CAUSE ARE NOT ADMINISTRATIVE SEARCHES PERMISSIBLE UNDER CAMARA v. MUNICIPAL COURT, 387 U.S. 523 (1967)

The government argues in Ortiz that there existed an area-wide equivalent of probable cause at the San Clemente checkpoint that made the automobile search constitutional even though the Border Patrol agents who conducted the search had no probable cause for believing or even a reasonable basis for suspecting that Ortiz's automobile was carrying illegal aliens. The government's chief authority for this argument is Camara v. Municipal Court, 387 U.S. 523 (1967). In Camara this Court held that an unconsented warrantless search of an apartment building by municipal building inspectors violated the Fourth Amendment but concluded that a warrant could be obtained on the basis of area-wide probable cause "if reasonable legislative or administrative standards for conducting an area inspection are satisfied with respect to a particular dwelling." 387 U.S. at 538. If there is area-wide probable cause, the constitutionality of the search of a dwelling for building code violations "will not necessarily depend upon specific knowledge of the condition of the particular dwelling." 387 U.S. at 538.

Camara reconciled the unique conflict between the homeowner's Fourth Amendment rights and the community's need to prevent and abate dangerous and unsanitary conditions. An unthinking and unhesitating application of Camara beyond the exceptional facts of such a case may lead to a general erosion of Fourth Amendment rights. Comment, Area Search Warrants in Border Zones: Almeida - Sanchez and Camara, 84 Yale L.J. 355, 370 (1974). Labelling a search as an administrative inspection does not eliminate the protective role of the Fourth Amendment. One of the hallmarks of a totalitarian society is the subjection of the citizenry to a myriad of routine administrative searches or inspections to ensure that the governed are not about to make any trouble for the government. Privacy and personal security, values which the Fourth Amendment is intended to protect, are lost in the process of identity checks and physical inspections. This Court should therefore be very hesitant in approving routine administrative "inspections" where federal officers lack the traditional probable cause to search.

The Court in Camara upheld the reasonableness of area code-enforcement because it found a long history of judicial and public acceptance, of such searches in the urban health context, a strong public interest that all such dangerous conditions be prevented or abated, and a relatively limited invasion of the urban citizen's privacy. The inspection of a dwelling for code violations was a relatively limited intrusion because the inspection was "neither personal in nature nor aimed at the discovery of evidence of crime." 387 U.S. at 537.

Searches of automobiles for illegal aliens, on the other hand, are personal in nature and aimed at the discovery of evidence of crime. The knowing transportation by automobile of illegal aliens is a felony punishable by a maximum of five years under 8 U.S.C. §1324(a)(2). Illegal aliens are thus a form of contraband, and searches of automobiles for illegal aliens are no different than searches of automobiles for contraband liquor. Both are searches for criminal evidence. Building codes, by comparison, are generally enforced by the inspector's issuance of an administrative compliance order to correct any violations discovered on the premises. The violation of the administrative order, not initial the presence of the code violation, is the criminal offense. Even if the presence of the code violation is itself a crime, as was the case under the New York City code provision cited in Camara, 387 U.S. at 531 n. 7, the penalties are generally light and the crime is one of the public welfare variety.

Building inspections are therefore administrative searches because their primary function is to insure that homeowners correct any violations on their premises. Vehicle searches for illegal aliens, on the other hand, are not transformed from searches for criminal evidence into permissible administrative searches simply because any illegal aliens discovered are normally deported rather than prosecuted criminally. It could just as well be argued that vehicle searches for untaxed liquor are administrative searches because the contraband liquor is always destroyed but the transporter may not always be prosecuted criminally. In

addition, smugglers of illegal aliens are prosecuted under 8 U.S.C. §1324(a)(2) for transporting illegal aliens, which is precisely what happened to Ortiz and Brignoni-Ponce in the instant cases.

While the illegal aliens who are passengers in the vehicle may be deported and not prosecuted criminally, the driver, who is the victim of the search, may well be prosecuted criminally, especially if he is an American citizen and therefore not subject to deportation. The Immigration and Naturalization Service's own reports indicate that during fiscal 1972, 2,927 violations of 8 U.S.C. §1324(a)(2), which punishes knowing transportation of illegal aliens, were presented to United States Attorneys for possible prosecution. Prosections were authorized in 731 or approximately one quarter of these cases. Only 873 violations of 8 U.S.C. §1324(a)(2) were closed by blanket or general waiver. By comparison, more than twenty times as many violations of 8 U.S.C. §1325, which punishes illegal entry, were closed administratively than were ever presented to tha United States Attorneys for possible prosecution. (A total of 376,197 violations of 8 U.S.C. §1325 were reported; of these only 16,783 were presented to the United states Attorneys for prosecution.) Hearings on H.R. 982 Before Subcommittee No. 1 of The House Committee on The Judiciary, 93rd Cong., 1st Sess., 31-32 (1973). Searches of automobiles for illegal aliens should therefore be treated in the same fashion as are searches of automobiles for contraband and other evidence of crime.

Camara is also distinguisable because

the need for building inspections for code violations is greater than is the need to search automobiles for illegal aliens. There is no way to determine whether the interior of a dwelling complies with a building code other than to inspect its interior. Illegal aliens may be apprehended in many ways in addition to searching the interior of vehicles on a public highway. Increased efficiency certainly is not a sufficient reason for subjecting all motorists within one hundred miles of our external boundary to arbitrary vehicle searches. Finally, the remaining reason advanced by the Court in Camara for modified search and seizure standards, the long history of judicial and public acceptance of area-wide building inspections, is not applicable in the context of vehicle searches for illegal aliens. "Although prior circuit court approval of these searches is technically a history of judicial acceptance it is insignificant in comparison with the history supporting the Camara court. Camara involved a practice that not only had been accepted for more than 150 years but also had been previously upheld by the Court in Frank v. Maryland." Comment, Area Search Warrant in Border Zones: Almeida - Sanchez and Camara, 84 Yale L.J. 355, 362 (1974).

For these reasons Camara should not be extended to permit area-wide probable cause to serve as the basis for automobile searches for illegal aliens in places as remote from the border as the San Clemente and California State Highway 86 checkpoints. The record does not indicate how many vehicles pass through these checkpoints annually or daily or how many vehicles are

searched, but it cannot be disputed that the overwhelming majority of vehicles potentially or actually subject to search are not transporting illegal aliens. While twenty or thirty illegal aliens may be apprehended in a normal 8 hour shift at San Clemente (App. Pet. in No. 73-2050 at 25A), the number of vehicles searched surely is much higher. If the approach were adopted that such limited results justified are wide searches for criminal evidence, large areas of this country might become in effect free-fire zones where area-wide searches for illegal aliens, or for other forms of contraband such as bombs, illegal handguns or narcotics, would be permissible because the relatively higher incidence of such contraband within the given areas would justify area-wide searches to uncover the evidence.

If area-wide probable cause is ever to justify vehicles searches for illegal aliens, advance judicial approval should be required through the warrant process, as it was in Camara for building inspections. Subsequent judicial consideration of the reasonableness of a program of adminstrative searches conducted on the basis of area-wide probable cause is not an adequate substitute for advance judicial approval because many innocent motorists will be subject to possible unconstitutional searches before a "guilty" one comes forward and subsequently changes the search by a motion to suppress in a criminal prosecution. See, infra, at p. n. . Furthermore, the government's argument that a warrant process is unworkable because the Border Patrol must retain a degree of surprise and flexibility in opening temporary checkpoints (Brief for Petitioner in Ortiz, No. 73-2050, at 41), indicates that the

Border Patrol wants to retain the authority to search at whim (or "seasoned judgment" as the government puts it) all vehicles in the Border area. The danger of arbitrary, discriminatory law enforcement adversely affecting the constitutional rights of innocent Mexican-Americans is too great to permit federal agents to conduct such searches without probable cause, without consent, and without advance judicial approval.

ARGUMENT

IV

THE FOURTH AMENDMENT DOES NOT PERMIT FEDERAL OFFICERS TO MAKE RANDOM, WARRANTLESS STOPS OF AUTOMOBILES ON THE PUBLIC HIGHWAY TO QUESTION THE OCCUPANTS CONCERNING THEIR RIGHT TO BE IN THE UNITED STATES.

In Brignoni-Ponce (No. 74-114), Border Patrol agents stopped respondent's automobile on the public highway and questioned its occupants as to their right to be in the United States. The stop did not take place at a fixed checkpoint but on the open highway. The Border Patrol agents who stopped respondent's automobile had observed many vehicles pass without stopping them before they stopped Brignoni-Ponce's automobile. The agents pursued and stopped the automobile for a routine immigration inspection solely because they observed that its three occupants appeared to be of Mexican descent; the agents had no basis for believing that either Birgnoni-Ponce or his two passengers were illegal aliens. 499 F.2d at 1112. The agents quite plainly intended to search the interior of the automobile and did so; but only after they had discovered that the passengers were illegal aliens.

The government contends that this "stop" and the subsequent search are not controlled by this Court's decision in Almeida-Sanchez v. United States, 413 U.S. 266 (1973). They claim that Almeida-Sanchez interpreted only 8 U.S.C §1357(a)(3), which

authorizes "...the board[ing] and search-[ing] for aliens... [of] any... vehicle...." The stop in the Brignoni-Ponce case, the government claims, was authorized under 8 U.S.C. §1357(a)(1), which authorizes Border Patrol agents "without warrant ...to interrogate any alien or person believed to be an alien as to his right to be or to remain in the United States...." Almeida-Sanchez, however did not turn on the nicety of the authorizing statute relied upon by the government. It was a decision examining the scope of Fourth Amendment protections. Even adopting the goverment's approach, its attempt to distinguish the instant case from Almeida-Sanchez, is unavailing.

The stop of Brignoni-Ponce's automobile was a "seizure" of the automobile and its occupants for Fourth Amendment purposes. "It must be recognized that whenever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person." Terry v. Ohio, 392 U.S. 1, 16 (1968). If stopping a person walking on the street to inquire about his activities constitutes a "seizure" of the person, stopping an automobile on a public highway to question its occupants about their right to be in the United States similarly constitutes a seizure of the automobile and of its occupants. "A person whose vehicle is stopped by police and whose freedom to drive away is restrained is as effectively 'seized' as is the pedestrian who is detained." United States v. Mallides, 473 F.2d 859, 861 (9th Civ. 1973). The occupants plainly are not free to leave while the questioning con-

tinues. Conceivably the driver or owner of the automobile is free, if the agents do not assert a right to search the automobile, to direct any available third party to remove it from the scene to any location he desires. However, the automobile has, nevertheless, been forcibly stopped and immobilized on the public highway and must remain stopped until the inquiry of its occupants is completed or arrangements are made to conduct the inquiry at a place separate from the automobile.

Random, roving patrol stops or seizures of antomobiles on the public highway, therefore, impose seizures and indignities that cannot be brushed aside as modest intrusions undeserving of significant Fourth Amendment protections. The stops abridge the driver's "right to free passage without interruption or search." Carroll v. United States, 267 U.S. 132, 154 (1925). It also adversely affects his interests in personal security. Law enforcement officers who pursue automobiles and direct them to the side of the road normally have cause to believe that there has been a violation of the law. At least this is the popular understanding of what is involved when a driver is forced to the side of the road by a police officer. Drivers stopped in this fashion naturally inquire of themselves: Why me? What have I done? Why did they pick on me? It is therefore a significant intrusion on personal liberty if a person lawfully driving on the public highway is ordered by Border Patrol agents to pull over to the side of the road and is detained there by the agents until they have finished their inquiries. The intrusiveness of the stop is further demonstrated by the fact that the

agents may take advantage of the plain view doctrine to observe much of the automobile's interior and may in appropriate cases even frisk for weapons those occupants of the automobile whom they reasonably believe to be armed and dangerous. Adams v. Williams 407 U.S. 143 (1972).

This Court has not separately treated the level or quantum of cause required for the stopping of individual vehicles on a public highway. Probable cause is necessary to stop and search an automobile for contraband or other evidence of crime, Chambers v. Maroney, 399 U.S. 42 (1970), and there is no clear indication that a smaller quantum of information will suffice to justify a stop alone. This Court has in any case never sanctioned random and potentially discriminatory stops of automobiles. The Court's opinion in Almeida-Sanchez v. United States, 413 U.S. 266 (1973), reflects at least as much concern with the random stop of the defendant's automobile in that case as with the subsequent random search of the automobile's interior:

> "It is undenied that the Border Patrol had no search warrant, and that there was no probable cause of any kind for the stop or the subsequent search...."

413 U.S. at 268 (emphasis added).

> "[N]either this Court's automobile search decisions nor its administrative inspection decisions provide any support for the constitutionality of the stop and search in the present case...."

413 U.S. at 272 (emphasis added).

At the very least this Court should require for an investigatory stop of an automobile and the interrogation of its occupants by federal officers the same level of cause that is required for the investigatory stop and interrogation of a pedestrian. In both instances law enforcement officers "must be able to point to specific and articulable facts, which, taken together with rational inferences from those facts, reasonably warrant... [t]he intrusion." Terry v. Ohio, 392 U.S. 1, 21 (1968). Any lesser standard would make a person's freedom of movement on the public highway subject to the inarticulate and unsubstantiated "hunches" of Border Patrol agents. 392 U.S. at 22.8/

8/ The stopping of automobiles by state and local police to check for operator's licenses and automobiles registrations raises different issues than do investigatory stops by Border Patrol agents. There is no way to determine whether the operator of a motor vehicle is properly licensed other than to stop the vehicle and question the driver. There are many ways to apprehend illegal aliens. Furthermore, the primary purpose of license checks is regulatory. In order to promote safety on the highways, police officers must be able to take reasonable measures to insure that only properly licensed drivers operate motor vehicles on the public highways. Despite these distinctions, there is nevertheless a division of authority on whether random vehicle stops to check operator's licenses are constitutional and there is a strong basis for arguing that to be constitutional stops for license checks must be conducted according to a systematic non-discretionary procedure and not on a random basis at the whim or uncontrolled discretion of police officers, Note, Automobile License Checks and the Fourth Amendment, 60 VA.L.REV. 666, 695-96 (1974).

The United States argues in Brignoni-Ponce (No. 74-114) that Section 287a(1) of the Immigration and Nationality Act, 8 U.S. C. §1357(a)(1), authorizes Border Patrol agents to stop any vehicle anywhere in the United States and question its occupants whenever the agents believe the vehicle contains aliens. (Brief of Petitioner in Brignoni-Ponce, No. 74-114, at 17-18.) The government does not indicate on what basis the agents believed Brignoni-Ponce or his passengers to be aliens. The government is evidently willing to accept the notion of alienage at a glance. For the agent believed that Brignoni-Ponce and his passengers were aliens simply because they looked like aliens, i.e., they appeared to be of of Mexican descent. Many United States citizens are of Mexican descent, and the government seemingly argues that the briefest glance at an individual by a Border Patrol agent permits the agent to arrive at a "belief" that the individual is not only of Mexican descent but also an alien from Mexico. Surely this approach gives free rein to the inarticulate and unsubstantiated hunches of Border Patrol agents and subjects Mexican Americans to discriminatory stops based solely on their racial appearance.

There is simply no rational basis for believing that a person of Mexican appearance traveling in an automobile on an Interstate Highway in Southern California is an alien, much less for believing that he is an alien whose presence in this country is illegal. Settlers and immigrants have come to this country from all corners of the globe, and most United States citizens today

bear to a greater or lesser extent the physical characteristics of persons dwelling in country or countries of origin. The physical characteristics of many Mexican American citizens may more clearly identify their country of origin than do the physical characteristics of citizens of Irish, German or other European descent. Mexico is also a country that shares a lengthy boundary with the United States and is the source of many illegal aliens within the United States. Nevertheless, to protect the constitutional rights of these Mexican American citizens and lawfully admitted aliens this Court should permit under 8 U.S.C. §1357(a)(1) the investigatory stop of a vehicle and the questioning of its occupants by the Border Patrol only when the Border Patrol agents have knowledge of specific and articulable facts that gives them reason to believe that the vehicle contains aliens whose presence in this country is illegal. 9/

9/ The government recognizes that it is only the high incidence of illegal aliens in border areas of the country that justify investigatory stops under 8 U.S.C. §1357(a)(1) and searches under 8 U.S.C. §1357(a)(3). (Brief for petitioner in Brignoni-Ponce, No. 74-114 at 13; Brief of Petitioner in Ortiz, No. 73-2050 at 20) and does not advance the potentially broader justification that federal officers may stop and search in order to keep under surveillance aliens whose presence in this country is lawful. The object of the stops and searches conducted under those sections in these cases was the discovery of aliens whose presence in this country is illegal. See e.g., App. in No. 73-6848 at 36 where the Border

(cont. next page)

Even the government recognizes that there is a difference between "what the Fourth Amendment may tolerate on the one hand and what the Immigration and Nationality Act may authorize on the other" (Brief for Petitioner in Brignoni-Ponce, No. 74-114 at 16), and that 8 U.S.C. §1357(a)(1) constitutionally can only authorize investigatory stops of vehicles where there is an area-wide equivalent of "reasonable suspicion not amounting to probable cause." (Id. at 14.) The government argues that the Fourth Amendment permits Border Patrol agents to stop all vehicles in such areas to question the occupants on their right to be or to remain in the United States (id. at 8) and evidently treats the additional requirement that the agents believe that the occupants are aliens to be solely a statutory requirement under 8 U.S.C. §1357(a)(1) and not a constitional requirement. Where there is an area-wide equivalent of reasonable suspicion not amounting to probable cause, the government argues that the suspicion "need not be focused with particularity on the specific vehicle to be stopped. It may be based, instead, upon knowledge of conditions in the area as a whole." (Id. at 14.)

The government recognizes that conditions in many areas of the country would not justify random vehicles stops on an area-wide basis (id. at 19) but leaves the creation of such free fire-zones to be unfettered discretion of executive officials in the Border Patrol without any prior judicial

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Patrol agent testified on direct examination, "I asked him to open up the back of the camper for a search for illegal aliens."

approval through the warrant process. Although the government indicates in its brief (id. at 19) that conditions in New York City would not provide an area-wide equivalent of cause sufficient to justify random vehicles stops, recent statements by the Commissioner of the Immigration and Naturalization Service indicate that there are a high concentration of illegal aliens in the New York Metropolitan area, perhaps more than one million. (New York Times, December 29, 1974, p.1 col.5 and December 31, 1974, p.26 col.1, City Edition.) Might not the Border Patrol create a new area for random stops of vehicles in portions of the New York Metropolitan Area where a large number of illegal aliens are believed to be employed? At the very least any such program of area-wide stops should be subject to the prior control of the warrant process since the burden of obtaining a warrant is not likely "to frustrate the governmental purpose behind the search." Camara v. Municipal Court, 387 U.S. 523, 533 (1967).

The government evidently believes that area-wide cause for stopping vehicles and questioning their occupants exists throughout the border region (Brief for Petitioner in Brignoni-Ponce, No. 74-114 at 19). If Border Patrol agents can make a warrantless stop of Birgnoni-Ponce's automobile on an Interstate Highway, 60 or so miles from the border, they could just as readily do so on a residential street in San Diego, which is also in the border region. Mr. Justice Powell in his concurring opinion in Almeida-Sanchez envisioned a more particularized judicial definition of the relevant "area" when he spoke approvingly of advance judicial approval for roving patrol stops and

searches "on a particular road or roads for a reasonable period of time." 413 U.S. at 282. If the Border Patrol is given discretion to create at will broad areas throughout the country for random stops, it will be resolving by itself "the type of delicate questions of constitutional judgment which ought to be resolved by the Judiciary rather than the Executive." 413 U.S. at 284. (Powell, J., concurring.) In addition, before approving any program of area-wide stops, the judiciary could require safeguards to protect the rights of Mexican Americans from discriminatory stops based solely on their racial physical appearance.

CONCLUSION

For the above reasons, and those stated in the briefs of the parties supported by the amicus curiae, the decisions in Ortiz (No. 73-2050), Brignoni-Ponce (No. 74-114) and Peltier (No. 73-2000) should be affirmed, and the dcision in Bowen (No. 73-6848) should be reversed.

Respectfully submitted,

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VILMA S. MARTINEZ
SANFORD JAY ROSEN
JOAQUIN G. AVILA
Mexican American Legal Defense
and Educational Fund
145 Ninth Street
San Francisco, CA 94103

EDWARD A. TOMLINSON
University of Maryland
School of Law
500 West Baltimore Street
Baltimore, MD 21201

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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-2050

UNITED STATES OF AMERICA, PETITIONER

v.

LUIS ANTONIO ORTIZ

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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1. Respondent argues that the Border Patrol's fixed traffic checkpoints in general and the San Clemente checkpoint in particular are unnecessary and ineffective elements in the Border Patrol's program for enforcing this country's immigration laws. That contention, however, is refuted by the evidence presented in the consolidated *Baca* proceeding. As the district court found, "[t]he evidence * * * clearly establishes that there is no reasonable or effective alternative method of detection and apprehension available to the Border Patrol, in the absence of the checkpoints" (Pet. App. 20A). "[T]hey effectively deter large num-

bers of aliens from illegally entering the country or violating the terms of any temporary crossing card they may have" (*id.* at 18A).

Respondent asserts that checkpoints are unnecessary because they "are but one of numerous Border Patrol operations to deter aliens from illegally entering the United States" (Br. 31). The existence of other enforcement techniques, however, does not make the checkpoints superfluous. Each of the Border Patrol's operations—the line watch, farm and ranch checks, transportation terminal surveillance, city patrols, crewman and stowaway controls, and traffic checks—has an important place in the total enforcement effort (see Tr. 28–29), and the effectiveness of each is dependent upon the existence of the others. If the highways were left unguarded, for example, the checking of train and bus terminals would be pointless, since illegal entrants would be free to travel inland in private vehicles without fear of detection and would thus be unlikely to use any other mode of transportation.

Motor vehicles are, in fact, the primary means by which illegal entrants travel to urban and agricultural job markets, and the record in the consolidated proceeding shows that traffic checkpoints are the principal hurdle to the inland movement of illegal entrants who have evaded the line watch (Tr. 123–124, 410). Deputy Chief Patrol Agent Batchelor testified that there is no feasible alternative to the checkpoints (Tr. 166). "Without those checkpoints there, we would be at a loss to say just what we would do" (*ibid.*).

Respondent asserts, however, that the manpower presently assigned to checkpoints could more efficiently be used as part of the line watch (Br. 37–41). The Border Patrol, he says, makes only a "token commitment" of manpower to the line watch (Br. 40) and makes "no real attempt at border apprehensions" (Br. 38). The facts are to the contrary. Acting Commissioner Greene testified (Tr. 29–30), and the district court found (Pet. App. 13A), that the line watch is the "first line of defense," responsible for apprehending 175,511 deportable aliens in fiscal year 1973. It also has highest priority for manpower. The Immigration and Naturalization Service informs us that more than half of all Border Patrol agents are currently assigned to the line watch function [1] and that traffic checkpoints in the Mexican border area use only 8.4 percent of the total force assigned to that area.[2]

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[1] Acting Commissioner Greene, stating that he did not have the information with him at the time of his testimony, estimated that "[m]aybe thirty percent" of the officers were assigned to the line watch (Tr. 88). We are informed by INS, however, that 50 percent is the correct figure.

[2] Respondent's assertion that "more personnel is devoted to the operation of inland checkpoints than to covering the border area" (Br. 39) appears to rest on his mistaken assumption that 20 officers are assigned to the line watch in the Chula Vista sector while 47 agents are stationed at the San Clemente checkpoint (Br. 39, n. 19). The record shows that 160 of the 270 agents assigned to the Chula Vista sector are in fact deployed on the line watch (Tr. 97). Only about two-thirds of the total force is available for assignment on any given day, and those agents are distributed over five overlapping shifts (Tr. 229). Moreover, the line watch demands less attention during daylight hours and on weekdays. Thus, Agent Batchelor testified that "[a]t this time of day, during the middle of the week, we

The record also reflects that, while more manpower is needed for each of the Border Patrol's functions, including the line watch, an increase in personnel on the border itself would not solve the problem of illegal entries. As the district court found, "[i]ncreased manpower on line watch would not make that activity appreciably more effective" (Pet. App. 14A); such an increase would by no means minimize the importance of the traffic checkpoints. It would require an enormous army of agents effectively to prevent unauthorized entries along the nearly 2,000 miles of the Mexican border. Chief Patrol Agent Felchlin estimated that he alone would need a complement of 21,000 officers to control illegal entries across the 75 miles of border in the El Centro sector (Tr. 393). That figure, of course, is only a fraction of what would be required to cover the entire 2,000 miles of the border. As Agent Batchelor testified, however, with anything less than blanket coverage along the entire border "a determined alien will keep penetrating, keep bouncing off of us and trying another spot" (Tr. 244).

In 1969, the Border Patrol together with other agencies participated in a 60-day experimental program to determine the effect on illegal entries and narcotics smuggling activities of adding substantial man-

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would have in the neighborhood of possible twenty men" on line watch (Tr. 229). The figure of 47 agents assigned to the San Clemente checkpoint—by far the largest of the Border Patrol's checkpoint operations—is the total complement for that checkpoint (Tr. 267), comparable to the figure of 160 assigned to the line watch. San Clemente can be operated with as few as five officers on a nighttime shift in the middle of the week and by as few as seven or eight on a daytime shift (Tr. 431).

power to the force on the line. Respondent says that the program demonstrated "the current ineffective border placement of officers" (Br. 40). The record shows just the opposite. Although the substantial publicity given the operation in Mexico appeared to deter some illegal border activity (Tr. 390), Agent Batchelor testified that the doubling of manpower at the line "had no noticeable effect" on the number of illegal entrants apprehended during that period at the checkpoints in the Chula Vista sector (Tr. 303), and Agent Felchlin stated that there was "a marked increase" in the number of apprehensions made at the checkpoints in the El Centro sector (Tr. 352). The operation apparently deterred some professional alien smugglers—"until they could see what was really going to develop" (Tr. 437)—but had little or no impact on individual crossings.

What "Operation Intercept" demonstrated is that ever a doubling of manpower on the line watch would not significantly reduce the need for traffic checkpoints as an essential secondary control (see Pet. App. 14A). It is not surprising, therefore, that if substantially increased manpower were made available to Agent Batchelor, he would deploy the officers in essentially the same way that his current force is deployed (Tr. 219–220).

Respondent's corollary argument is that the traffic checkpoints are ineffective in deterring illegal entry. "We have only to look around us at the millions of illegal aliens currently living and working in the United States to see that the deterrent value of inland immigration roadblocks has been negligible" (Br. 36).

The contention is a *non sequitur*. That millions of illegal entrants have evaded apprehension does not contradict the overwhelming evidence that the Border Patrol's traffic checkpoints are highly effective in deterring millions of others from entering this country unlawfully (Tr. 39, 161, 352). Agent Felchlin testified that the checkpoints in the El Centro sector are "one of the greatest deterrents that we have at our disposal" (Tr. 352). He based that judgment on interviews with illegal entrants apprehended in this country and upon information derived "from our intelligence sources in Mexico" (Tr. 353).

The checkpoints have made it costly for any potential violator to penetrate the border and move successfully inland to job markets. Many must pay professional smugglers $225 or more to be transported inland (Tr. 185, 411, 421; Pet. App. 19A). Since "the average income among Mexican nationals who may wish to seek residence here illegally is quite small, * * * this cost tends to act as a very significant deterrent in and of itself" (Pet. App. 19A). The elaborate smuggling techniques described by the district court (Pet. App. 18A–19A; see Tr. 132–138) have been developed principally to combat the checkpoints (Tr. 139), and an alien who pays a smuggler to assist him is buying a means of evading traffic checkpoints (Tr. 422). Agent Batchelor testified that "the smugglers would be out of business immediately if we didn't have the checkpoints" (Tr. 187).

Despite the elaborate efforts to evade them, the checkpoint operations apprehended 55,300 deportable aliens in fiscal year 1973 (Pet. App. 17A). This is

itself a significant figure, but it is not, of course, a fair measure of the effectiveness of the operations, for they are designed principally to *deter* illegal entry. The credibility of a deterrent cannot be assessed solely by reference to the number of violators who were apprehended; the more effective it is, the less productive it is likely to be. The Border Patrol's experience in operating checkpoints unexpectedly [3] or over unusually long periods [4] demonstrates that their operation indeed

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[3] Some smugglers know that the heavy volume of traffic on Interstate Route 5 on Sunday afternoons usually makes it impractical to operate the San Clemente checkpoint at that time. On one such Sunday afternoon, however, additional manpower was deployed at San Clemente, and the checkpoint was kept open. As Agent Batchelor testified, the results were impressive (Tr. 156):

"We made—seized twenty-one smuggling vehicles with loads at the checkpoint. They just blundered on in, and we had another twenty some odd vehicles abandoned south of the checkpoint. * * * Two days later, we were still rounding up aliens in Camp Pendleton that had left these vehicles and gone into Camp Pendleton."

A total of more than 300 illegal entrants were apprehended as a consequence of the Sunday operation (Tr. 158).

Similar results were obtained when the San Clemente checkpoint was closed down for a short period and then opened again (Tr. 408). Scouts had notified smugglers that it was safe to proceed north on Interstate Route 5, but the checking was resumed while they were en route, and the drivers "had no way of knowing that [the checkpoint] was put up until they reached it" (*id.*).

[4] Checkpoints cannot ordinarily be operated around-the-clock. On one occasion, however, the San Clemente checkpoint was operated continuously for five days, and smugglers were unable to transport illegal entrants on Route 5. When the "drop houses" began to overflow, some smugglers attempted to take a different, unfamiliar route and found themselves unexpectedly at the coordinate California checkpoint at Oak Grove. "[T]here

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acts as a powerful deterrent to the inland transportation of illegal entrants (Tr. 138–139, 149, 156–158, 408–409; Pet. App. 20A).[5]

2. Respondent contends that most of the Border Patrol's checkpoints are located further from the border than is necessary to accomplish their purpose (Br. 41–43). The record shows, however, that geographic considerations and the widespread fraudulent use of border-crossing identification cards make it necessary to place most checkpoints at least 25 miles from the border (*e.g.*, Tr. 32–33, 353; Pet. App. 16A). As

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were seven loads that they sent through Oak Grove and five of those loads were caught at the checkpoint" (Tr. 409).

Similarly, when Oak Grove was kept in continuous operation for three days, 80 illegal entrants were apprehended there during the first eight hours, including three smuggling cases (Tr. 149). Thereafter, apprehensions dwindled. Agent Batchelor testified that the dwindling effect indicated that "the unusual had occurred as far as the organized smugglers were concerned, and so they became completely inactive until they had a chance to evaluate what were we doing" (Tr. 149).

[5] Respondent asserts that the San Clemente checkpoint "captures only about 5% of the alien traffic traversing through it north on Interstate 5" (Br. 37). That figure rests on a questionable extrapolation from Border Patrol estimates of the number of illegal entries in the Chula Vista sector and the proportion of illegal entrants who travel inland on Interstate Route 5 (see Resp. Br. App. 5a–6a). It does not take account of the aliens who are apprehended by the line watch. But even if respondent's figures were accurate, they would not suggest that the checkpoint should be abandoned. It is inevitable that many illegal entrants will be able to pass through the checkpoint undetected, for the checkpoint cannot be operated 100 percent of the time, and the agents cannot inspect every vehicle that approaches. The fact remains, however, that the operation of that checkpoint is a highly effective deterrent to illegal entry (Tr. 408–410).

Agent Felchlin testified, "[s]trategically, the traffic check operations are located at the first possible location where we can effectively control the traffic out of the Imperial Valley" (Tr. 353). Professional smugglers commonly furnish their illegal entrants with illicit border-crossing cards by which to enter at a regular port of entry (see Tr. 404–405). Since those cards authorize the holder to travel up to 25 miles from the border, a checkpoint placed within that range would be ineffective in deterring the inland movement of the illegal entrant. Documentation authorizing travel beyond the 25-mile limit, however, is far more difficult for a smuggler to obtain (Tr. 420–421).

Moreover, the immediate border area is generally unsuitable for traffic control operations because there are too many roads to cover effectively and because such operations would disrupt commuter and shopper traffic. Agent Batchelor testified that if checkpoints in the Chula Vista sector were placed within a mile or two from the border, "it would be havoc" (Tr. 162). "The normal business of this metropolitan area here could not be conducted" (*ibid.*). Even if checkpoints were placed five miles from the border in that area, it would require twelve stations to do the job accomplished now by three and would still require the checking of far more traffic, including 'bumper to bumper" commuter traffic, than is checked at existing stations (Tr. 162–163). Agent Felchlin testified to the same effect with respect to the El Centro sector (Tr. 321–322).

3. Respondent argues that checkpoint operations are subject to a "high potential for abuse" (Br. 50). All vehicles that pass through the San Clemente checkpoint, he says, are "stopped initially for a visual examination of the occupants and interior of the vehicle by the point officer" (Br. 21),* whose decision to refer the vehicle to the secondary inspection area for inquiry as to the citizenship of the occupants and possible physical inspection of the vehicle may be made "for other than proper reasons" (Br. 51). Respondent further states, without any support whatsoever, that "referrals to the secondary area for interrogation and search are based upon skin color" (Br. 53).

The Acting Commissioner of INS was subjected to cross-examination in the consolidated proceeding concerning this point. He testified that skin color and

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*The evidence in the consolidated proceeding does not clearly answer the question whether all vehicles are brought to an initial stop (see Tr. 184–185). For the Court's convenience, we have reproduced in the appendix to this reply brief, *infra*, p. 1a, an official Border Patrol photograph of the San Clemente checkpoint (as well as one of the State Highway 86 checkpoint (p. 2a) involved in the consolidated *Bowen* case). Although, as the San Clemente photograph shows, the point officer stands behind a stop sign facing oncoming traffic, we are informed by INS that the traffic is slowed to about five miles per hour at the checkpoint and, apart from the vehicles referred to the secondary inspection area, nearly all are waved through by the officer without a stop. See, for example, the facts in *United States* v. *Evans*, C.A. 9, No. 74–2095, decided October 23, 1974, which involved the pursuit and stop of a vehicle after an officer at the Oak Grove checkpoint in California, while waving the vehicle through without a stop, saw two persons who appeared to be Mexicans lying on the floor in the space behind the front seat.

racial characteristics are not the basis for referrals to the secondary inspection area (Tr. 73–75):

> Q. Is it not true that the Border Patrolman looks for those who are dark with Latin features?
>
> A. No. I wouldn't say that.
>
> * * * * * *
>
> Q. Now, have you discussed with current Border Patrolmen, the type of person that they stop for questioning?
>
> A. I have.
>
> Q. And have you not learned that frequently they stop persons who look Latin?
>
> A. No. I think that you have to look at the total picture, whether the car—whether it is tilted, whether the driver—or after he has looked at him, talked to him, whether he proceeds to go on questioning.
>
> Q. Now, isn't it true that many persons are not stopped for conversation at all?
>
> A. That's true.
>
> Q. Those people are simply waved through?
>
> A. That's true.
>
> Q. But some are stopped for some sort of discussion, isn't that true?
>
> A. True.
>
> Q. And aren't those the people who tend to look Mexican? That is, with black hair and darker features?
>
> A. Not necessarily.
>
> Q. By "not necessarily" does that mean no?
>
> A. I'll say no.

The decision to refer a vehicle for secondary inspection does not depend, as respondent claims, on the Latin-American appearance of its occupants. That

is not to say that Border Patrol officers ignore the complexion and physiognomy of the occupants of a vehicle. They are, after all, looking almost exclusively for illegal Mexican entrants, and it would affront common sense to expect that facial appearance or skin color would play no part in arousing their suspicions. Those factors are not, however, the "key criteria used by the point officer in referring occupants and their vehicles to secondary" (Resp. Br. 53, n. 25).

Border Patrol officers, relying on their experience and professional judgment, look instead for "visual signs" (Tr. 272) of possibly illegal immigration activity. Some of the factors that may suggest a "break in the pattern" of normal traffic (Tr. 325) and that may arouse a seasoned officer's suspicion are reflected in the record of the consolidated proceeding. These include the number of persons in the vehicle, the behavior of the driver and passengers, their inability to speak English, the responses they give to any questions asked by the officer, the nature of the vehicle, and indications that the vehicle may be heavily loaded (Tr. 324–325, 380–383, 434). The officer also takes into account the time of day or night and traffic conditions (Tr. 324, 380, 434).

The Immigration and Naturalization Service has informed us that experienced Border Patrol officers look for persons with the characteristic appearance of Mexican residents, an appearance that distinguishes those persons from the thousands of Mexican aliens who lawfully reside in this country and the thousands of American citizens of Mexican ancestry. Illegal Mexican entrants commonly appear thin, their hands

are rough and work-worn, their hair is cut in a characteristic fashion, and they are frequently dressed in full-cut and coarsely-woven material. Experience has shown, we are told, that illegal entrants may exhibit obvious nervousness or affect excessive nonchalance as they approach a checkpoint.

The driver of a vehicle containing illegal entrants may also contribute to a break in the usual pattern of lawful traffic. The officer is alert to inconsistencies between the appearance of the driver and the appearance of the passengers or the nature of the vehicle, the driver's failure to slow the vehicle, and any erratic stopping or slowing of the vehicle suggesting nervousness. Suspicion may also be aroused if the driver attempts to answer questions addressed to his passengers.

Finally, the vehicle itself may indicate the possibility of illegal alien activity. Foreign license plates may be evidence of Mexican residence; a spare tire or excessive clothing or baggage in the rear seat area may suggest the presence of concealed persons in the trunk of an automobile; a vehicle riding unusually high, low, or stiffly may indicate that the trunk is heavily loaded or that the car is equipped with overload springs.

These are some of the factors that may lead an agent to refer a vehicle for secondary inspection, but it is not an exhaustive list. It is impossible to identify all the circumstances that might arouse the suspicion of an experienced Border Patrol officer. Moreover, agents must rely occasionally upon what Agent Batchelor referred to as a "sixth sense" (Tr. 431). To function effectively as a deterrent to illegal entry,

a checkpoint must pose a serious obstacle to the professional smuggler as well as the individual violator. Since, as respondent argues, many thousands of illegal entrants are able to evade detection at the checkpoints despite the agents' conscientious efforts to identify suspicious vehicles based upon articulable factors, it is apparent that some otherwise innocent-appearing vehicles in fact carry illegal entrants. If those intent on violating the immigration laws of this country could be confident that a carefully disguised vehicular smuggling operation would be immune from a random or "sixth sense" inspection at a checkpoint, the deterrent would be significantly undercut.

4. It follows, we submit, that the warrant procedure envisioned by respondent would either severely weaken the deterrent effectiveness of checkpoint operations or provide no significant additional protections. Assuming that a judicial officer could fashion a warrant "delineating with specificity those criteria upon which a Border Patrolman may act in directing vehicles off the highway into a secondary area for interrogation and search" (Br. 63), what "criteria" would be delineated? Would an effort be made to incorporate all the considerations that in fact influence a Border Patrol officer's judgment, including an element of intuition or randomness? If so, the warrant would simply authorize a continuation of the practice that has been followed without a warrant. Would it simply forbid officers to refer a vehicle for secondary inspection on the basis of a "sixth sense"? If so, for the reasons we have indicated, the effectiveness of checkpoint operations would be diminished. Would the

"criteria" be limited to facts amounting to particularized founded suspicion or probable cause? If so, the checkpoints would be emasculated, for it is a rare case in which a point officer's brief glimpse at a vehicle can reveal sufficient facts to constitute traditional probable cause to believe that it contains illegal entrants.[7]

It is true, as respondent states and as our opening brief indicated, that warrants have been issued for some checkpoints in the Southern District of California. It is equally true, however, that those warrants do not attempt to "delineat[e] with specificity those criteria upon which a Border Patrolman may act" (Resp. Br. 63). They simply authorize the Border Patrol officers "to stop northbound motor vehicles for the purpose of making routine inquiries to determine the nationality and/or immigration status of the occupants of said vehicles" (Resp. Br. App. 2a).[8]

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[7] One such rare case is illustrated in the appendix to this reply brief, *infra*, pp. 11a and 12a. The photographs, which were introduced in evidence in the consolidated proceeding in the district court, show a vehicle visibly carrying a large number of persons crowded together (which turned out to be 27 illegal entrants). More commonly, however, concealed aliens are found in the trunk of an automobile, as in the present case, or in specially designed compartments of vehicles, as in the cases illustrated on pp. 3a–4a, 7a–10a, *infra*. Occasionally, an illegal entrant will be discovered under the hood of an automobile (pp. 5a–6a) or even under the chassis (p. 12a). (Each of these official Border Patrol photographs was also introduced in evidence in the district court.)

[8] Warrants issued from June 22 to July 11, 1974, also authorized Border Patrol officers at checkpoints "to conduct a routine inspection of said vehicles for the presence of aliens"

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Respondent says (Br. 66–67) that the issuance of these limited checkpoint warrants and the government's willingness to seek such warrants answers the argument in our opening brief (pp. 38–40) that the interrelationship between the various checkpoints would make it difficult to fashion a workable warrant procedure. It should be obvious, however, that the government has sought the issuance of warrants only because the Ninth Circuit held that checkpoints could not be operated without warrants. What the government's actions reflect is not a belief that the procedure is workable, but only a recognition that a checkpoint system of reduced effectiveness is still more useful for law enforcement purposes than no checkpoint system at all.

5. Respondent repeatedly states (Br. 6, 10, 58–59) that the Fifth and Tenth Circuits, like the Ninth, have ruled that warrantless checkpoint searches are unlawful in the absence of probable cause. The Fifth Circuit's decision in *United States* v. *Speed*, 497 F. 2d 546, pending on the government's petition for a writ of certiorari, No. 74–599, involved a pre-*Almeida-Sanchez* search at a "temporary" checkpoint and purports to rest on the pre-*Almeida-Sanchez* law of the circuit. The decision squarely conflicts in that respect, however, with decisions of other panels of the Fifth Circuit that have upheld convictions based on evidence

(Resp. Br. App. 2a). Warrants issued thereafter, however, have omitted the "inspection" authority. The result is that checkpoint operations under the warrants have been limited to interrogation stops; searches for aliens have been conducted only with consent or on the basis of probable cause.

seized in pre-*Almeida-Sanchez* checkpoint searches. *United States* v. *Phillips,* 496 F. 2d 1395; *United States* v. *Cook,* 492 F. 2d 747; *United States* v. *Merla,* 493 F. 2d 910.

Moreover, another panel of the Fifth Circuit recently held, after an exhaustive review of all the prior Fifth Circuit decisions in this area, that a warrantless, non-probable-cause search of a vehicle for aliens at the Border Patrol's permanent checkpoint at Sierra Blanca, Texas, was reasonable under the Fourth Amendment. *United States* v. *Hart,* No. 73-3949, decided January 15, 1975. The court stated (slip op. 2532):

> At permanent checkpoints, the commitment of time, money, personnel, and the administrative decision for location of the search are all presumably such as to remove to a large extent the individual arbitrariness that might be available to roving agents. * * * A permanent checkpoint does not have the constitutionally frightening aspect of a roving patrol * * *.[9]

The Tenth Circuit's decisions in *United States* v. *King,* 485 F. 2d 353, and *United States* v. *Maddox,* 485 F. 2d 361, held that a warrantless checkpoint

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[9] Although the court concluded that the Sierra Blanca checkpoint is the "functional equivalent" of the border, its application of that term was far broader than the Ninth Circuit's definition and quite similar to that of the district court in the consolidated proceeding in this case. The Fifth Circuit specifically "reject[ed] the idea that every vehicle must be shown to have probably crossed the border to be legally stopped at the Sierra Blanca checkpoint, however important that element might be to the kind of thorough search that can be made at an international boundary" (slip op. 2533-2534).

search without probable cause could be lawfully conducted only at the "functional equivalent" of the border, but it did not define that term. Instead, it remanded the cases to the district court to determine whether the Border Patrol's permanent checkpoint at Truth-or-Consequences, New Mexico, 98 miles from the border, is the functional equivalent of the border.[10] The lawfulness of warrantless searches of vehicles for aliens at that checkpoint has thus not yet been decided by the Tenth Circuit.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.
JOHN C. KEENEY,
Acting Assistant Attorney General.
MARK L. EVANS,
Assistant to the Solicitor General.
JEROME M. FEIT,
ROBERT H. PLAXICO,
Attorneys.

FEBRUARY 1975.

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[10] The very distance of that checkpoint from the border suggests that the Tenth Circuit at least open to a far more expansive definition of the "functional equivalent" concept than the Ninth Circuit has accepted or than we have contended for before this Court in the instant case.

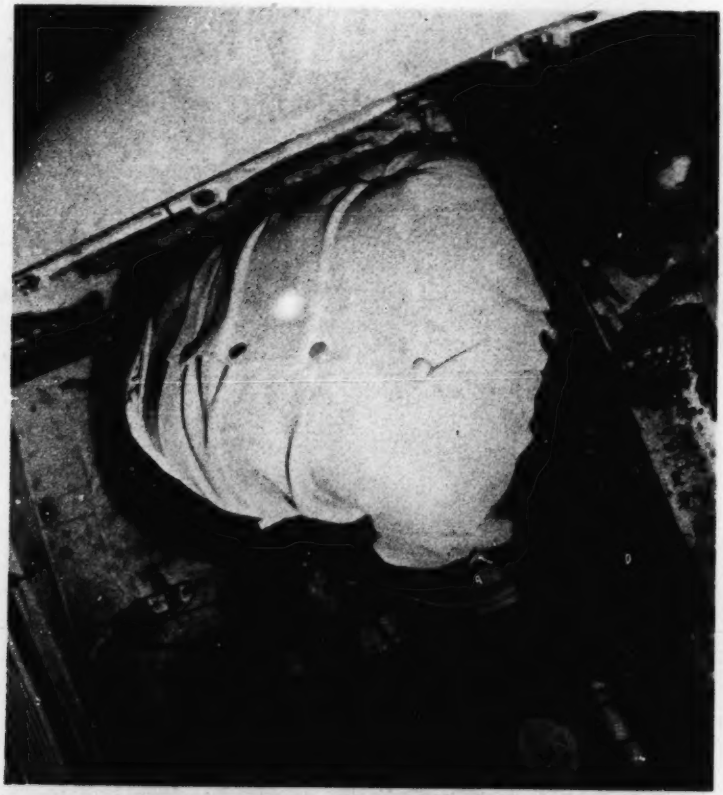
San Clemente Traffic Checkpoint

State Highway 86 Traffic Checkpoint

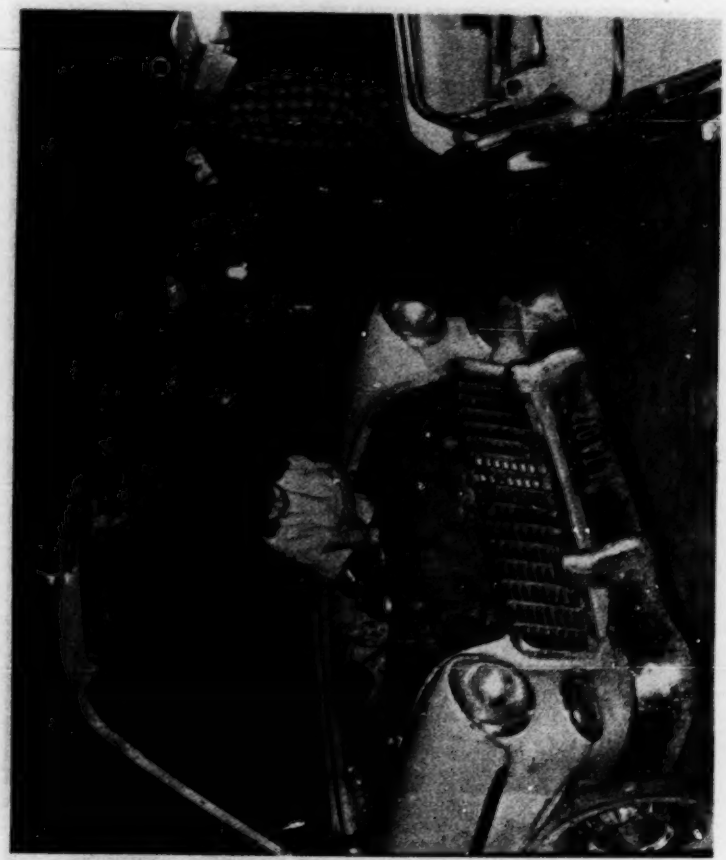
3a

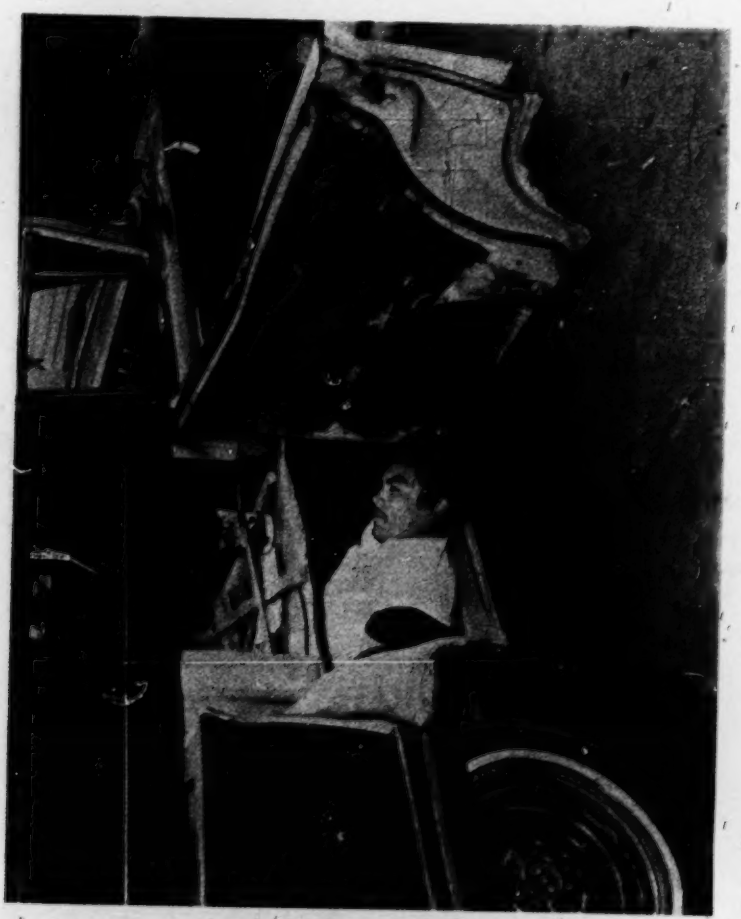
4a

5a

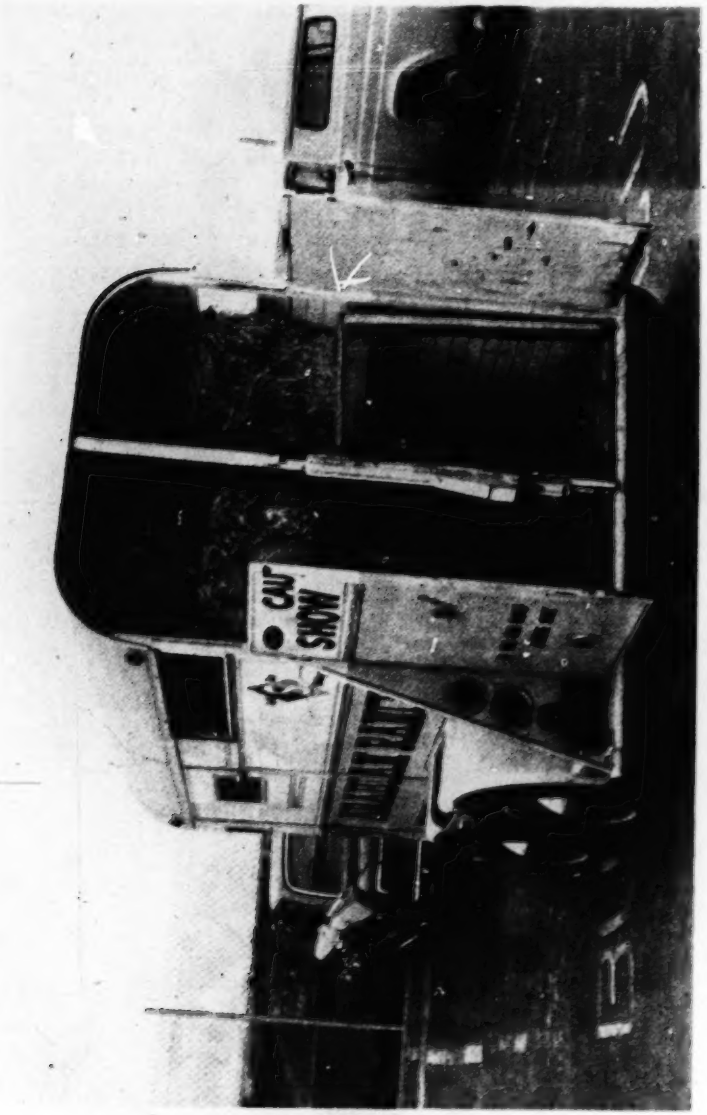


6a





CAUTION
SHOW HORSES
ARABIAN RANCH


CAUT
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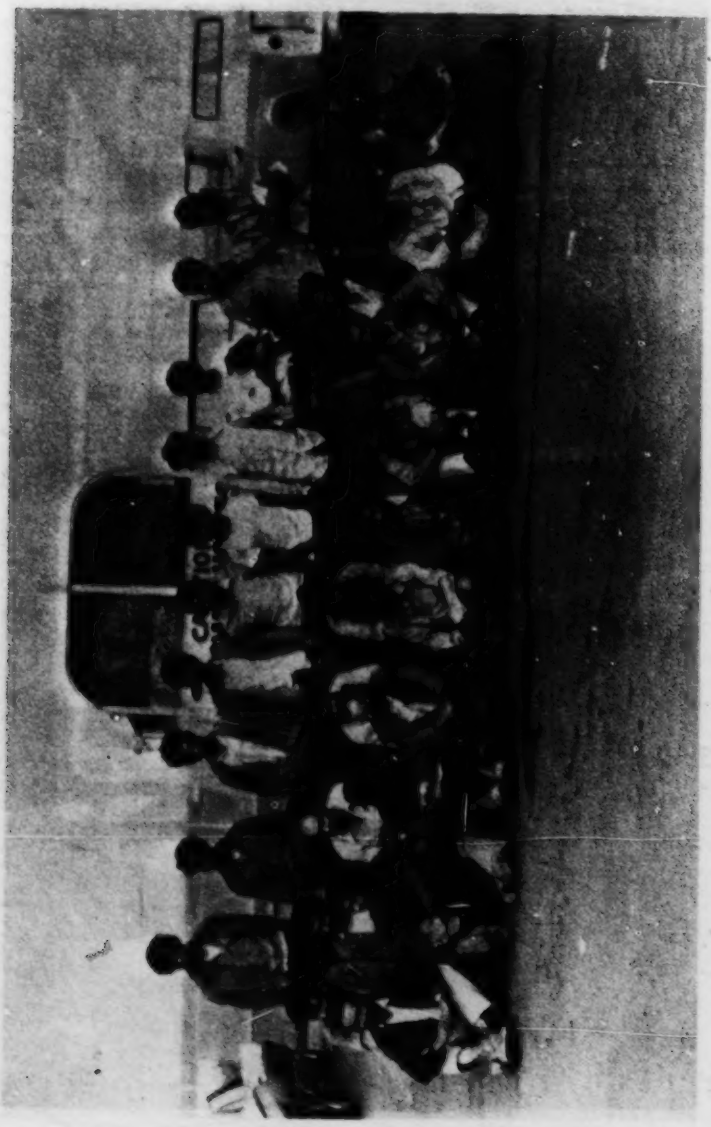
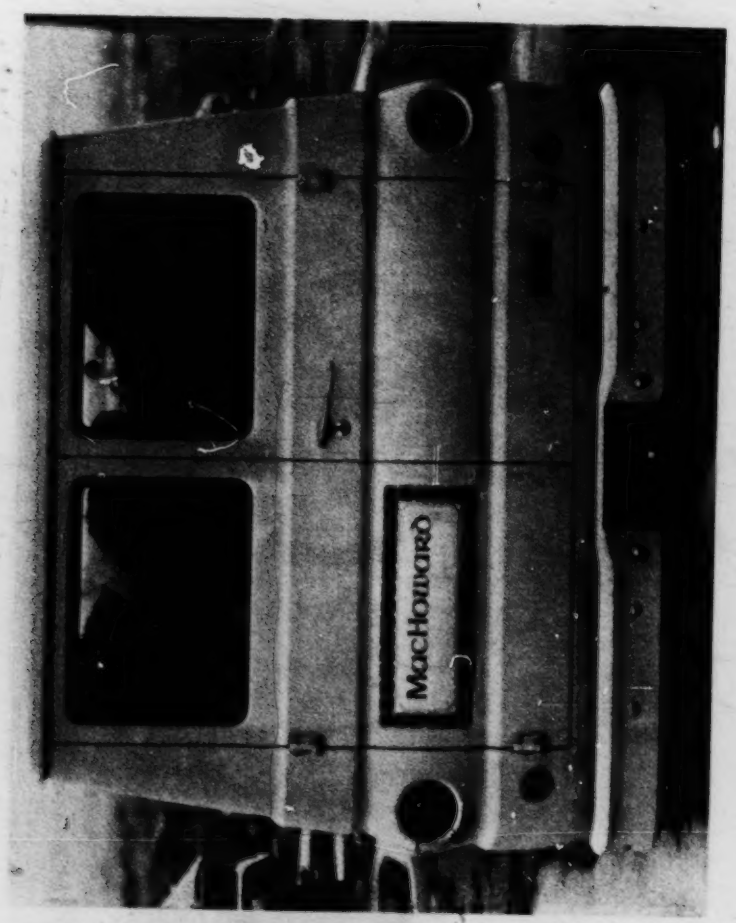
10a




MacHOWARD

13a

U. S. GOVERNMENT PRINTING OFFICE : 1975 O - 568-700

(Slip Opinion)

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

UNITED STATES *v.* ORTIZ

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 73–2050. Argued February 18, 1975—Decided June 30, 1975

The Fourth Amendment forbids Border Patrol officers, in the absence of consent or probable cause, to search private vehicles at traffic checkpoints removed from the border and its functional equivalents, and for this purpose there is no difference between a checkpoint and a roving patrol. *Almeida-Sanchez* v. *United States*, 413 U. S. 266, followed. Pp. 2–8.

Affirmed.

POWELL, J., delivered the opinion of the Court, in which DOUGLAS, BRENNAN, STEWART, MARSHALL, and REHNQUIST, JJ., joined. REHNQUIST, J., filed a concurring opinion. BURGER, C. J., filed an opinion concurring in the judgment, in which BLACKMUN, J., joined, see No. 74–114. WHITE, J., filed an opinion concurring in the judgment, in which BLACKMUN, J., joined, see No. 74–114.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 73-2050

United States, Petitioner, *v.* Luis Antonio Ortiz. | On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

[June 30, 1975]

MR. JUSTICE POWELL delivered the opinion of the Court.

Border Patrol officers stopped respondent's car for a routine immigration search at the traffic checkpoint on Interstate Highway 5 at San Clemente, California, on November 12, 1973. They found three aliens concealed in the trunk, and respondent was convicted on three counts of knowingly transporting aliens who were in the country illegally. The Court of Appeals for the Ninth Circuit reversed the conviction in an unreported opinion, relying on dictum in its opinion in *United States* v. *Bowen*, 500 F. 2d 960 (CA9 1974), aff'd, *post* p. —, to the effect that our decision in *Almeida-Sanchez* v. *United States*, 413 U. S. 266 (1973), required probable cause for all vehicle searches in the border area, whether conducted by roving patrols or at traffic checkpoints. We granted certiorari. 419 U. S. 824 (1974).

Nothing in this record suggests that the Border Patrol officers had any special reason to suspect that respondent's car was carrying concealed aliens. Nor does the Government contend that the San Clemente checkpoint is a functional equivalent of the border. Brief for the United States, at 16. The only question for decision is whether vehicle searches at traffic checkpoints, like the roving-patrol search in *Almeida-Sanchez*, must be based on probable cause.

I

In *Almeida-Sanchez* we rejected the Government's contention that the Nation's strong interest in controlling immigration and the practical difficulties of policing the Mexican border combined to justify dispensing with both warrant and probable cause for vehicle searches by roving patrols near the border. The facts did not require us to decide whether the same rule would apply to traffic checkpoints, which differ from roving patrols in several important respects. 413 U. S., at 273; *id.*, at 276 (MR. JUSTICE POWELL, concurring).

A consolidated proceeding on motions to suppress in this and similar cases produced an extensive factual record on the operation of traffic checkpoints in Southern California. *United States* v. *Baca*, 368 F. Supp. 398 (SD Cal. 1973). The San Clemente checkpoint is 62 air miles and 66 road miles north of the Mexican border. It is on the principal highway between San Diego and Los Angeles, and over 10 million vehicles pass the checkpoint in a year. *United States* v. *Martinez-Fuerte*, — F. 2d —, — (CA9 1975). The District Court in *Baca* described the checkpoint as follows:

> "Approximately one mile south of the checkpoint is a large black on yellow sign with flashing yellow lights over the highway stating 'All Vehicles, Stop Ahead, 1 Mile.' Three-quarters of a mile further north are two black on yellow signs suspended over the highway with flashing lights stating 'Watch for Brake Lights.' At the checkpoint, which is also the location of a State of California weighing station, are two large signs with flashing red lights suspended over the highway. These signs each state 'Stop Here—U. S. Officers.' Placed on the highway are a number of orange traffic cones funneling traffic into two lanes where a Border Patrol agent in full dress

uniform, standing behind a white on red 'Stop' sign checks traffic. Blocking traffic in the unused lanes are official U. S. Border Patrol vehicles with flashing red lights. In addition, there is a permanent building which houses the Border Patrol office and temporary detention facilities. There are also floodlights for nighttime operation." 368 F. Supp., at 410–411.

The Border Patrol would prefer to keep this checkpoint in operation continuously, but bad weather, heavy traffic, and personnel shortages keep it closed about one-third of the time. When it is open, officers screen all northbound traffic. If anything about a vehicle or its occupants leads an officer to suspect that it may be carrying aliens, he will stop the car and ask the occupants about their citizenship. If the officer's suspicion persists, or if the questioning enhances it, he will "inspect" portions of the car in which an alien might hide.[1] Operations at other checkpoints are similar, although the traffic at some is light enough that officers can stop all vehicles for questioning and routinely inspect more of them.

The Government maintains that these characteristics justify dispensing with probable cause at traffic checkpoints despite the Court's holding in *Almeida-Sanchez*. It gives essentially two reasons for distinguishing that case. First, a checkpoint officer's discretion in deciding

[1] Such places typically include the trunk, under the hood, and beneath the chassis. If the vehicle is a truck, a camper, or the like, the officer inspects the enclosed portion as well. But an immigration inspection is not always so confined. In *Almeida-Sanchez*, the officer removed the back seat cushion because there were reports that aliens had been found seated upright behind seats from which the springs had been removed. 413 U. S., at 286 (WHITE, J., dissenting).

which cars to search is limited by the location of the checkpoint. That location is determined by high-level Border Patrol officials, using criteria that include the degree of inconvenience to the public and the potential for safe operation, as well as the potential for detecting and deterring the illegal movement of aliens. By contrast, officers on roving patrol were theoretically free before *Almeida-Sanchez* to stop and search any car within 100 miles of the border. Second, the circumstances surrounding a checkpoint stop and search are far less intrusive than those attending a roving-patrol stop. Roving patrols often operate at night on seldom-traveled roads, and their approach may frighten motorists. At traffic checkpoints the motorist can see that other vehicles are being stopped, he can see visible signs of the officers' authority, and he is much less likely to be frightened or annoyed by the intrusion.

These differences are relevant to the constitutional issue, since the central concern of the Fourth Amendment is to protect liberty and privacy from arbitrary and oppressive interference by government officials. *Camara* v. *Municipal Court*, 387 U. S. 523, 528 (1967); *Schmerber* v. *California*, 384 U. S. 757, 767 (1966). The Fourth Amendment's requirement that searches and seizures be reasonable also may limit police use of unnecessarily frightening or offensive methods of surveillance and investigation. See, *e. g.*, *Terry* v. *Ohio*, 392 U. S. 1, 16–17 (1968); *Camara*, *supra*, at 531; *Schmerber*, *supra*, at 771–772. While the differences between a roving patrol and a checkpoint would be significant in determining the propriety of the stop, which is considerably less intrusive than a search, *Terry* v. *Ohio*, *supra*, they do not appear to make any difference in the search itself. The greater regularity attending the stop does not mitigate the invasion of privacy that a search entails. Nor do

checkpoint procedures significantly reduce the likelihood of embarrassment. Motorists whose cars are searched, unlike those who are only questioned, may not be reassured by seeing that the Border Patrol searches other cars as well. Where only a few are singled out for a search, as at San Clemente, motorists may find the searches especially offensive. See Note, Border Searches and the Fourth Amendment, 77 Yale L. J. 1007, 1012–1013 (1968).

Moreover, we are not persuaded that the checkpoint limits to any meaningful extent the officer's discretion to select cars for search. The record in the consolidated proceeding indicates that only about 3% of the cars that pass the San Clemente checkpoint are stopped for either questioning or a search, 368 F. Supp., at 411. Throughout the system, fewer than 3% of the vehicles that passed through checkpoints in 1974 were searched, Brief for the United States, at 29, and no checkpoint involved in *Baca* reported a search rate of more than 10% or 15%. 368 F. Supp., at 412–415. It is apparent from these figures that checkpoint officers exercise a substantial degree of discretion in deciding which cars to search. The Government maintains that they voluntarily exercise that discretion with restraint and search only vehicles that arouse their suspicion, and it insists the officers should be free of judicial oversight of any kind. Viewed realistically, this position would authorize the Border Patrol to search vehicles at random, for no officer ever would have to justify his decision to search a particular car.

This degree of discretion to search private automobiles is not consistent with the Fourth Amendment. A search, even of an automobile, is a substantial invasion of privacy.[2] To protect that privacy from official

[2] The degree of the invasion of privacy in an automobile search

arbitrariness, the Court always has regarded probable cause as the minimum requirement for a lawful search. *Almeida-Sanchez, supra,* at 269–270; *Chambers* v. *Maroney,* 399 U. S. 42, 51 (1970). We are not persuaded that the differences between roving patrols and traffic checkpoints justify dispensing in this case with the safeguards we required in *Almeida-Sanchez.* We therefore follow that decision and hold that at traffic checkpoints removed from the border and its functional equivalents, officers may not search private vehicles without consent or probable cause.[3]

The Government lists in its reply brief some of the factors on which officers have relied in deciding which cars to search. They include the number of persons in

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may vary with the circumstances, as there are significant differences between "an automobile and a home or office." *Chambers* v. *Maroney,* 399 U. S. 42, 48 (1970); *Almeida-Sanchez* v. *United States, supra,* at 279 (POWELL, J., concurring).

[3] Not every aspect of a routine automobile "inspection," as described in n. 1, *supra,* necessarily constitutes a "search" for purposes of the Fourth Amendment. There is no occasion in this case to define the exact parameters of an automobile "search."

Nor do we have occasion to decide whether a warrant could issue approving checkpoint searches based on information about the area as a whole, in the absence of cause to believe that a particular car is carrying concealed aliens, because the officers had no such warrant in this case and had not tried to obtain one. See *Almeida-Sanchez* v. *United States, supra,* at 275 (POWELL, J., concurring); *Camara* v. *Municipal Court, supra.* We also need not decide whether checkpoints and roving patrols must be treated the same for all purposes, or whether Border Patrol officers may lawfully stop motorists for questioning at an established checkpoint without reason to believe that a particular vehicle is carrying aliens. Cf. *United States* v. *Brignoni-Ponce, ante,* p. —. Nor do we suggest that probable cause would be required for all inspections of private motor vehicles. It is quite possible, for example, that different considerations would apply to routine safety inspections required as a condition of road use.

a vehicle, the appearance and behavior of the driver and passengers, their inability to speak English, the responses they give to officers' questions, the nature of the vehicle, and indications that it may be heavily loaded. All of these factors properly may be taken into account in deciding whether there is probable cause to search a particular vehicle. In addition, as we note today in *United States* v. *Brignoni-Ponce*, *ante*, p. —, the officers are entitled to draw reasonable inferences from these facts in light of their knowledge of the area and their prior experience with aliens and smugglers. In this case, however, the officers advanced no special reasons for believing respondent's vehicle contained aliens. The absence of probable cause makes the search invalid.

II

The Government also contends that even if *Almeida-Sanchez* applies to checkpoint searches, the Court of Appeals erred in voiding this search because it occurred after the date of decision in *Almeida-Sanchez* but before the Court of Appeals stated in *United States* v. *Bowen*, *supra*, that it would require probable cause for checkpoint searches. Examination of the Government's brief in the Ninth Circuit indicates that it did not raise this question below. On the contrary, it represented to the court that the decision in *Bowen* would be "determinative of the issues in this case." We therefore decline to consider this issue, which was raised for the first time in the petition for certiorari.

Affirmed.

SUPREME COURT OF THE UNITED STATES

No. 73–2050

United States, Petitioner, v. Luis Antonio Ortiz.	On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

[June 30, 1975]

MR. JUSTICE REHNQUIST, concurring.

I joined the dissent of my Brother WHITE in *Almeida-Sanchez* v. *United States*, 413 U. S. 266 (1973), and recognize that the present decision is an extension of the unsound rule announced in that case. I nonetheless join the opinion of the Court, because a majority of the Court still adheres to *Almeida* and because I agree with the Court's analysis of the significance of the Government's proffered distinctions between roving and fixed-checkpoint searches.

I wish to stress, however, that the Court's opinion is confined to full searches, and does not extend to fixed-checkpoint stops for the purpose of inquiring about citizenship. Such stops involve only a modest intrusion, are not likely to be frightening or significantly annoying, are regularized by the fixed situs, and effectively serve the important national interest in controlling illegal entry. I do not regard such stops as unreasonable under the Fourth Amendment, whether or not accompanied by "reasonable suspicion" that a particular vehicle is involved in immigration violations, cf. *United States* v. *Brignoni-Ponce*, *ante*, and I do not understand today's opnion to cast doubt upon their constitutionality.